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ABSTRACT

The status of judicial theory regarding private responsibility for granting procedural due process, and the extent to which policies in New England's private postsecondary institutions adhered to judicial requirements for due process in nontenured faculty terminations were studied. A review of the literature, research methodology, and definition of terms are given. Due process, court cases, and judicial posture are reported. In an analysis of the status of state action in private higher education, general information is presented regarding the state's ability to intervene, sex discrimination and the Nexus-Aggregate argument, rules of procedure distractions, and it is concluded, among other things, that state action may occur at the time in which the state elects to promote teacher employment. A chapter on due process policies in New England's private sector discusses the nature, purpose, and methodology of the study in New England. It is also concluded that since 1961, in major state action cases involving private postsecondary schools, it has been acknowledged that state action could be found in activities of independent colleges and universities. Appendices include: original and follow-up letters of transmittal; frequency of answers to questionnaires by state and size of institution; and evaluations of institutional policies in the northern and southern regions and in each state. A selected bibliography is included. (LC)

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ABSTRACT

PROCEDURAL "DUE PROCESS" REMEDIES AVAILABLE TO NONTENURED FACULTY IN PRIVATE POSTSECONDARY EDUCATION IN NEW ENGLAND IN 1979

By

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B.S., Husson College, 1958

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A Dissertation Submitted in Partial Fulfillment of
The Requirements for the Degree of
Doctor of Philosophy

WALDEN UNIVERSITY

April 1980

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ABSTRACT

During the 1960s and 1970s, court challenges to the traditional autonomy of private associations produced a judicial and scholarly debate over what conditions would implicate the state in private personnel affairs. This study was designed to investigate, analyze, and report (1) the status of judicial theory regarding private responsibility for granting procedural due process and (2) the extent to which policies in New England's private postsecondary institutions adhered to judicial requirements for due process in nontenured faculty terminations.

Through an analysis of major cases and the resulting literature, an appraisal was made of the status of private constitutional vulnerability in higher education. Through employment of a mail questionnaire which had been designed from court-promulgated hearing procedures, New England's private institutions were surveyed for the purpose of determining if their faculty termination policies could withstand court challenges by recalcitrant professors. The study yielded a response rate of 87.5 percent, with no state response of less than 80 percent.

The investigation found that in the late 1970s an entrenched judicial abstention philosophy prevailed and that decisions reflected a narrowing view of the conditions which warranted court review of internal practices.

Policies reported by 79.5 percent of the institutions participating in the survey were sufficient to preclude judicial intervention in most faculty nonrenewal decisions.

MAY 1 6 1980

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CHAPTER I

STATEMENT OF THE PROBLEM AND ITS DEVELOPMENT

In an often quoted phrase in McNabb v. United States (38), Frankfurter wrote for the Supreme Court in 1943 that "the history of liberty has largely been the history of observance of procedural safeguards." (38:347). O'Brien agreed with that sentiment as it reflected the government's policies and practices in both civil and criminal cases. In discussing the deprivation of faculty entitlements to continued employment at private colleges and universities, he also contended that even in exclusively private conduct there has been a universal public sentiment that it is unjust to take adverse action against any individual without first offering him at least elementary processes. (97:175).

In the legal sense due process has generally meant that by means of fair and orderly proceedings, individual rights and liberties would be protected against unilateral and arbitrary withholding. (6:101). However, the courts have not elucidated a precise meaning for the term, and concepts of fairness have not been uniform among all groups. Moreover, they may have been influenced by regional or other variables. Private postsecondary education in New England has been provided by institutions of a widely varying character. The assortment has included colleges and universities which were either proprietary, private nonprofit, two-year, baccalaureate, and/or graduate schools. Some were world renowned while others were virtually unknown. Because of their diversity, because due process has not been clearly defined, and because the exact degree of institutional autonomy in faculty matters has remained unknown, there was a basis for doubt as to whether academic due process for the nontenured existed to any appreciable degree in private postsecondary educational institutions in New England.

Statement of the Problem

The obligation to provide due process of law was imposed on the federal government by the fifth amendment and on the states by the fourteenth. (112:351). In noncriminal matters the guarantees were not constitutionally interpreted, and, barring sufficient state involvement in their internal policies, private institutions have traditionally not been constitutionally constrained in their right to unilaterally and arbitrarily sever their relationships with their faculty. (95:7). Throughout the 1960s and 1970s, however, there were increasing instances of court challenges to the independence of private institutions and a resulting emergence of some criteria by which judicial intrusion into internal policy making could occur. (110:45-46). The criteria, however, have not been well understood and the Supreme Court's pronouncements on the subject during that period have not reflected a consistent judicial philosophy. (114:478-81). In addition to uncertainty about adjudicative standards, an unresolved problem has been in determining at what point the conflicting social values of institutional versus individual autonomy warranted judicial inquiry. (109:856-64).

Elkind suggested that private higher education's vulnerability to constitutional challenges derived partly from the power that private universities could sometimes exert over their faculty and partly from the government's interest in higher education. (72:690-98). From his study of cases involving private entities and the Constitution, Elkind concluded that:

> Private persons who possess power to significantly deprive a general community of rights generally protected by the Constitution against state infringement possess powers equivalent to those of government. Such private persons and those exercising certain peculiarly governmental functions threaten these rights as effectively as government itself. Thus the purpose for which the constitutional amendments were ratified justify imposing restraints on the parties who weild such power. Moreover, relevant constitutional amendments may be regarded as limitations not merely upon government, but upon governmental powers generally. (72:691).

Resulting from what Corson called a "spate of legal decisions," the autonomy of both private and public higher educational institutions has been trammelled by the judiciary in several areas, including issues involving faculty employment security. Attributing the phenomenon in part to the generally greater accessibility of the courts as well as their apparent readiness to challenge long-standing institutional policies, he noted that judicial decisions have intruded into the decision-making prerogatives of college presidents, trustees, and faculty. (4:55-56). Rood pointed out the importance of academic inquiry into the problem as it pertained to faculty retention-nonretention policies:

> Recent court cases involving faculty termination spell out in fairly clear and sometimes surprising ways the legal issues associated with faculty termination. The interpretation one finds in court of issues such as expectancy of reemployment, freedom of speech, and immunity from suit are at great variance with those voiced within the academic community. An understanding of this shift in rules will help both faculty members and administrators avoid decisions that result in expensive and needless litigation. (105:123).

In their summary of some of the fundamental legal issues confronted by American society, Kolasa and Meyer discussed what has been referred to as the "private government" character of some organizations which, although actually nongovernmental, have had an influence on the lives and well being of their members similar to that of the government. Because of that impact, they explained that a legal question has emerged regarding whether such entities should be held constitutionally accountable for the equitable treatment of those on whom they have such influence and should thus be subject to the same checks and balances as the "public government." (6:15). They noted that:

> In this view due process of law, judicial review, and other constitutional rights deserve a place in the procedures that could confront a single individual in a corporation, labor union, or even in an educational institution. Dismissal from a company has long been referred to as "industrial capital punishment." . . . Safeguards similar to those available to the individual under a public legal system may be desirable in the private organization. (6:15).

If Rood was correct that the academic community's grasp of the requirements regarding faculty terminations was at odds with the legal realities and if the extent to which private institutions must answer for constitutional promises has not been resolved, the possibility of judicial receptivity to reviewing the constitutionality of private higher education's decisions and policies seemed imminent.

Background

Although the fifth and fourteenth amendments' promises were intended to be proscriptions on government activity (98:168), for over thirty years there have been comments from the courts and the legal writers cautioning that private conduct in contravention of those guarantees was not necessarily immune from judicial scrutiny. In delivering a 1946 Supreme Court opinion, Black warned the owners of private resources:

> Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. (40:278).

Making reference to emerging attempts to implicate private higher educational institutions in particular with constitutional responsibility, Holtzoff, delivering a 1967 opinion for a U.S. district court, described growing judicial involvement as "an entering wedge" which could lead to "a serious external domination of universities and colleges" and hinder their intellectual development and growth. (100:66). The next year, in attempting to comprehend the character of the judiciary's growing participation in private educational decisions, O'Neil complained that the extent of constitutional complicity among nongovernmental institutions was "as significant as it is elusive." (98:168). In the following year Cohen urged a pragmatic approach to dealing with the problem, advising that if school administrators were to think in functional terms and develop appropriate rules for internal management of personnel, they could anticipate the judiciary and design policies more satisfactory than those which the courts were likely to impose. (68:648). Frakt raised some questions on the propriety of judicial review of faculty retention decisions, also in 1969:

> Are the courts to judge the merits of scholarly writings? Are they to observe the classroom to detect the subtle flaws which distinguish the unsuccessful from the successful teacher? Are they to attempt to gauge the merits of a teacher in the important professional and social interplay among faculty colleagues? Clearly, the answer to all of these questions is "no." But, are they really relevant questions which must be asked? . . .
>
> . . . the courts are increasingly confident in their ability to discern questions of judicial merit without interfering in the zone of expertise that is the basis of administrative discretion, and they are examining the rulings of school administrators with regard to their fulfillment of all the requisites of due process. (78:46-48).

Schubert acknowledged in 1970 an "imminent possibility that even private universities may fall within the ambit of the fourteenth amendment guarantees." (107:323). By 1973 Canavan witnessed the Supreme Court's "ever-growing insistence on 'due process' in nonstate or private institutions" which, he said, not only was changing the nature of private higher education, but as a result of increasingly urgent demands for due process procedures, new substantive rights were being created. (67:116-17). In 1975 Faccenda and Ross observed a "dramatic increase in judicial and administrative review" of both public and private internal policies. (74:539). In the same year Yackle contended that such developments were an acknowledgment by the courts that the constitutional system was intended to offset what he considered to be the usual majoritarian disregard for individual rights. (114:479). Later that year, however, the New York University Law Review disputed the popular assertion that private institutions were truly constitutionally accountable. (108:1403-4). Concurring, Antoun asserted that rather than further implicating private institutions with government responsibility, an examination of Supreme Court decisions showed that they were actually establishing criteria for distinguishing private from state responsibility. (59:722). Moreover, in 1978 the Supreme Court confirmed one of its earlier observations that even when public institutions were challenged with due process violations, it knew of "no case which holds that colleges and universities are subject to the supervision or review of the courts in the uniform application of their academic standards." (14:954, note 4).

Importance of the Inquiry

In addition to the threat of judicial review, in the 1960s and 1970s institutions of higher learning have also been subject to expansive federal regulation designed to improve employment opportunity and security (73:5-9) and to an enduring teacher assertiveness. (105:123-24). In view of the fact that education is a labor-intensive process (4:185), educational administrators have been under pressure to seek and maintain faculty compositions disproportionate in lower salaried, less experienced and/or educated professors. (97:195). These factors, when combined with the erosion of education's public esteem, have encroached on institutional autonomy in the management of its own affairs. (58:129). Aiken described the consequences:

> Unless colleges and universities and their personnel can achieve a more reliable control over the tide of legal claims which has in recent years cascaded over them, many of them are in danger of losing their capacity to excel in the pursuit of truth and learning.
>
> That capacity is vitally dependent upon the autonomy of informed judgments about matters of educational quality. Such judgments are of a kind that it is not always possible to substantiate their validity by any systematic adversarial process of listing and weighing evidences pro and con, searching for indications of possible error, as legal procedures require. (58:132-33).

While the professoriate has organized for the protection of their own academic independence, Oaks complained that the private colleges have not done so. (96:3, 5-7). Assessing as "nearly overwhelming" the possibility that private colleges and universities would, without warning, be held liable as agents of the state and suddenly accountable for all of their constitutional transgressions, Faccenda and Ross reported that until an issue was reviewed at a court hearing, none could know for certain whether the federal courts would assume jurisdiction. This phenomenon they described as an "oppressive price to pay for certainty." (74:558). To avoid having to pay that price, they recommended a "results oriented program" (74:548), stating:

> Thus it would seem advantageous that the administrator of a private institution strive wherever possible to provide the same constitutional protection of the individual as required by law at public institutions. (74:558).

A study by Bakken revealed that the federal courts were less likely to intervene where there had been no procedural violations of individual rights and administrators had confined their activities to dealing with problems involving educational policy. (62:204). Aiken noted, however, that because many college and university administrators lacked an appreciation of fundamental legal processes, their unwitting conduct probably contributed more to the frustration of their organizational objectives than did any other factor. (58:133). In any event, Baird and MacArthur found that procedures which had been privately designed had maintained the ability of collegiate employers to take "prompt action" in faculty matters. They pointed out that, to the contrary, requirements which had been fashioned by the courts were purposely designed to "slow down" administrative actions "to the extent necessary to ensure that the officials have given fair consideration to the competing interests of all of those whose interests will be affected." (61:216-17).

While they noted that internally designed programs could be guided by legal pronouncements, Faccenda and Ross asserted that private constitutional vulnerability would never be susceptible to precise analysis. (74:558). Aiken agreed that if an institution could be certain of its possible liability in faculty issues, it could alter its practices in order to minimize that liability exposure. (58:155). However, he opined, modern judicial decisions:

> . . . defy the possibility of distinguishing between lawful and unlawful except in terms of final adjudication in a particular area, and even then the distinction is made often to rest upon rules and evidence which were either non-existent, unknown, or reasonably supposed to be irrelevant to liability at the time of the activity in question. (58:155).

Elkind added that the exposure areas of private accountability were less clear in the 1970s than they had been in the preceding twenty years (72:705), a development which Rood considered unfortunate for lay administrators because the question of liability could not be answered, as it could in the past, by a determination of whether an institution was public or private. (105:127). Furthermore, Hendrickson found that because of the differences in the way various state regulatory statutes defined "private," it had become impossible to interpret the term by any national reference. (81:74-75). To add to administrative uncertainty, not only was the issue of private vulnerability in question, but according to Saphire's study, at the close of 1978 due process decisions themselves lacked predictability. (106:115).

It was intended that this study would (1) provide private higher educational administrators with an improved understanding of the legal implications of their nontenured faculty retention policies and (2) provide information to private postsecondary administrators in New England regarding the regional norms of due process. On the basis of this information, administrators should have an improved capacity for deciding whether to acquiesce to the ethic of the bar and to the norms of their colleagues or to assume an independent posture. Aiken addressed the question when he wrote:

> . . . there is a limit to the extent to which policies and practices more vital to the institution's educational objectives should be sacrificed to accommodate pressures of liability exposure, whether those pressures are exerted against the institution, its governors or staff, or all of them. This is simply to say that it requires a certain degree of courage to undertake any responsible enterprise, and higher education is no exception. (58:132).

This study was not predicated on any assumption that administrators must, or even should, amend their policies to adhere to the research findings. It was intended only to help assure that their decisions be enlightened.

Assumptions and Hypothesis

While the goal of due process has been the promotion of fairness in depriving an individual of some beneficial interest, the concept of due process has been more concerned with the employment of a mechanism designed to assure the fulfillment of that purpose. Notions of fairness may have been derived from group norms, but the preservation of due process was entrusted to the judiciary. Presumably, the judiciary would be guided by normative perceptions of fairness within the relevant community.

Given the limited role of government in a system which reveres private enterprise, it was assumed that the courts would tend to avoid intrusion into the internal affairs of private higher education. Unless motivated to the contrary by the force of some compelling government interest, such as upholding legislative prohibitions against unconscionability in contractual and employment relationships, they would be reinforced in their abstention to the extent that faculty retention policies were perceptually fair. There was no reason to doubt that administrators of academic institutions would wish to be anything but fair in their dealings with all faculty, including those without tenure. Because of the pervasiveness of tenure systems in American colleges and universities, it was also assumed, however, that throughout the community of higher education there would be sufficient deference to executive latitude that administrators' unilateral decisions not to renew probationary teachers' contracts would be perceived as comporting with academic norms of fairness.

The inquiry was predicated on an assumption that the greater the quantum of fairness in faculty retention policies, the less likely would be an occurrence of judicial intervention in disputes challenging nonrenewal. It was assumed further, however, that in contrast to the education community's concept, the judiciary's perception of fairness would approximate due process practices similar to those it had promulgated in its own noncriminal proceedings. By a judicial standard, then, the presumption was that due process policies probably did not guide private institutional decisions not to renew nontenured faculty contracts.

The investigation proceeded on the premises that (1) there were circumstances under which nontenured teachers could acquire either contractual or constitutional due process grounds for court challenges of decisions not to renew their contracts, (2) federal courts could obtain constitutional jurisdiction over some of the conduct of private colleges and universities, and (3) in those cases, if the institutional mechanisms did provide the usual procedural due process safeguards, private colleges' and universities' nonrenewal decisions would be upheld by the courts. Conversely, if the procedures did not include the elements of due process, they ran the risk of being overturned. The judiciary could be expected to respect community values. However, whenever such nonrenewal decisions were seen by the courts as being arbitrary, the private institutions were vulnerable to due process challenges. Therefore it was hypothesized that:

Procedural academic due process is not sufficiently available at most private postsecondary institutions in New England to make them invulnerable to court challenges against their unilateral decisions not to renew nontenured faculty contracts.

It was intended that the institutional procedures would be considered sufficient if they adhered to standards which had been identified by courts as comporting with due process in faculty contract renewal disputes. It was felt that if sufficient academic due process was found not to exist, college and university administrators should have criteria for the revision of faculty retention and nonretention policies in order to (1) safeguard any protections to which nontenured faculty were lawfully entitled, (2) minimize the vulnerability of their institutions to legal actions by teachers who may allege that such protected rights were denied, and (3) reduce errors, uncertainties, and dissatisfactions within their institutions in the interest of organizational harmony and equity.

If it was found that adequate due process did exist, it was expected that evidence thereof should (1) assure faculty that their rights were not being disregarded, (2) minimize challenges to institutional autonomy, and (3) improve organizational efficiency in achieving institutional objectives.

It has been suggested that faculty at independent schools were likely to seek legal advantages similar to those that were available to their counterparts in the public institutions. (74:557). Moreover, it was seen as likely that whatever view may have been held by the law community regarding what constituted equitable treatment, the subject community would not be likely to consider the promises of the U.S. Constitution as having been fulfilled unless they perceived a basic fairness in the treatment of their own employment relationships.

Purposes, Questions, and Scope of the Investigation

The purposes of this study were to investigate pertinent court decisions and related literature regarding due process in higher education, devoting particular attention to the private sector, and to analyze the constitutional due process vulnerability of private postsecondary institutions. As a result of that analysis, an assessment was made of the extent and character of procedural due process available to nontenured faculty employed by private postsecondary institutions in New England. The investigation was guided by an attempt to answer the following research questions:

1. What are the governmental interests in higher education with regard to college and university obligations to provide academic due process?
2. What initiatives are available to nontenured professors who wish to challenge administrative decisions not to renew their contracts?
3. If postsecondary institutions are found to have procedural obligations, to what extent are the obligations affected by the institutions' public or private character?
4. For private institutions which have not voluntarily provided pretermination procedures for their nontenured faculty, what conditions might make them vulnerable to due process challenges?
5. If a nontenured teacher can successfully assert an institutional obligation to grant due process, what minimum procedures would withstand judicial scrutiny?
6. Do private postsecondary institutions in New England grant procedures sufficient to meet the judicial test?

Nontenured faculty were selected as the subject of this study because those who have tenure were found to be already entitled to procedural safeguards. Matheson explained that: "Basic to any tenure plan for academic personnel is the requirement that before dismissal or contract nonrenewal, procedural protections must be accorded." (93:615). Heaton added:

> In addition to preventing dismissal of faculty members for exercising constitutionally protected rights, the due process clause of the fourteenth amendment prevents the dismissal of faculty members on grounds that are trivial, unrelated to educational process, or unrelated to working relationships within the college or university. This standard serves to prevent dismissals that are arbitrary, capricious, or wholly without rational basis. However, tenured professors rarely need resort to this standard since the cause standard that must be met to justify dismissing a tenured faculty member is considerably more severe than this "rational basis" requirement of the due process clause. (80:378).

With deference to the complexity of constitutional interpretation, sufficient legal authority was found to be residing in both judicial and academic literature to elicit the tenets of procedural due process. The issue had achieved notoriety sufficient to activate an abundance of litigation and sufficient legal writing. As a result, the investigation was able to educe (1) standards for meaningful academic due process in the nonrenewal of nontenured faculty contracts and (2) some of the conditions which created the institutional obligation to provide it. The concomitant role of the private institutions in the community of higher education and their legal duties to their nontenured faculty were found to be somewhat less understood. Therefore, it became necessary to pursue the broader issue of constitutional accountability among all private actors in the society and the resulting implications for private higher education. Following that inquiry, the due process practices of private postsecondary institutions in New England were queried by surveying academic administrators knowledgeable about faculty personnel policies. The study was intended to reveal not only the character of institutional procedures but also any differences of a regional or institutional nature which might emerge.

An examination was made of the major cases which, according to the literature, contributed to a theory of private constitutional accountability. While the concept originated in 1883 (114:484), it was not until 1961 that private higher education became implicated. (81:58). The literature survey began, therefore, with a review of scholarly analyses of the theory just prior to private education's entry into the constitutional debate and followed its development to the time of the New England survey.

New England was selected for the study because it was perceived as an area with some recognized regional identity and because a broader sampling could have caused the introduction of additional variables unnecessary to the analysis.

An inquiry into the due process obligations of public institutions was not the main purpose of this study. However, to whatever extent "due process" was a derivative of the Constitution, the full character of that obligation would necessarily be from a public institutional vantage. Stated differently, the "constitutional" obligations of private institutions could not rise above those of the public colleges and universities. Therefore, the approach taken was to characterise that obligation as the standard and then to inquire to what extent private institutions were liable for it. Toward that end, part of the inquiry became involved with public institutions.

Methods and Procedures

It was the design of this study, by answering the research questions, to test the hypothesis that procedural academic due process was not legally sufficient in New England's private sector. The first five questions were intended to evince the criteria for legal sufficiency and the last question, to reveal the extent and character of their presence in the region. The methods employed for answering the questions were:

1. Analysis of the literature written by legal scholars regarding the historical background and the development of judicial policy on due process in private higher education
2. Content analysis of the court cases identified by the literature as those which had formed the theoretical bases for (a) identifying the

governmental interest in higher education, (b) isolating the criteria for judicial intrusion into the affairs of private associations, (c) measuring the applicability of the criteria to private higher education, and (d) appraising the validity of faculty nonrenewal procedures

3. Analysis of the constraints to judicial intervention in the personnel policies of private colleges and universities
4. Surveying, summarizing, and reporting the nonrenewal and termination policies in New England

The methodology, then, involved the application of principles of both historical research and case analysis. It was also necessary to weigh the effects of some constitutional amendments and related congressional enactments on the shaping of pertinent judicial policy. The case and literature analyses were presented in Chapter II; jurisdictional constraints were analyzed in Chapter III; and the study of New England's policies was reported in Chapter IV.

Case and Literature Analysis

The court cases were examined for the purpose of identifying (a) the level of court which issued each decision, (b) the issues of law disclosed by the special fact configurations, and (c) both concurring and dissenting opinions which clarified the judicial policy. The responses to these cases by the various legal writers were compared and analyzed, and generalizations were formulated and reported. On the basis of the generalizations, a pattern of judicial thought affecting institutional susceptibility to intrusion was observed and reported according to:

1. Conceptual problems in formulating academic due process procedures
2. Problems in distinguishing between public and private responsibility for providing academic due process

3. Criteria for determining which conduct was purely private and which was affected with a public interest
4. Criteria for designing judicially sufficient procedures

Analysis of Judicial Constraints

A 1977 study of the relationships between the states and private higher education concluded that the trend of decisional law tended to suggest an expansion of grounds for judicial review of internal policies. (119:50-51). The cases to which that inquiry made reference, along with the arguments that had been advanced, were analyzed according to (a) the precedent effect of each of the decisions, (b) the chronological sequence of the decisions, (c) the rules of procedure which influenced the decisions, (d) the extent to which the decisions were affected by jurisdictional barriers to intervention in higher education, and (e) the effect of the decisions on the continuing development of judicial policy. The purpose of the analysis was to determine whether the decisions warranted the expansionist prognosis and to what extent, if any, judicial policy would be altered. The objective was to assist in an assessment of the vulnerability of New England's faculty nonrenewal procedures.

New England Policies

Institutions which had been selected for the study were all the private postsecondary establishments in New England. From the judicially acknowledged nonrenewal procedures as established in Chapter II, a questionnaire was developed and, after being field tested, was mailed to the highest academic officer at each college or university. The academic officers were not asked to make judgments about the legal sufficiency of their nonrenewal procedures, but rather to identify the court-promulgated procedures that were in practice at their institutions. A rating scale was developed for testing the adequacy of each institution's policies for terminating the contracts of its nontenured faculty members. The results were summarized, cross-classified, and reported according to the variables of location, size, highest degree offered, and regional accreditation. The hypothesis, as presented in Chapter I, could thus be tested by recording and observing the level of legal sufficiency of the institutions' nonrenewal procedures.

The central purpose of the study had not been to attribute causes to the differences among institutions. As a corollary, however, the variables were tested to determine if they had an influence on the extent of legal sufficiency. For purposes of the supplemental inquiry, hypotheses were presented about the effects of the variables and were tested with a chi-square analysis.

The design and methodology for the New England study has been reported in detail in Chapter IV.

Limitations of the Study

The investigation was an attempt to discover the applicability and character of any due process which might be owing to teachers involuntarily separated from private higher educational institutions. As such, it made no attempt to contribute to due process theory, to alter the definition, or to appraise the quality or accuracy of judicial pronouncements. Rather, it endeavored to articulate the judiciary's view, as found in their decisions and related dictum, and to synthesize the literature which has grown out of the developing body of decisional law on those subjects. The facts reported in connection with any of the cases cited in this study were confined to those which affected the evolving theory of academic due process or of the procedural obligations of private colleges and universities. While it was recognized that this approach could cause the drawing of inaccurate conclusions about the merits of some of the litigants' positions in a dispute, to engage in a polemic of their peculiarities in all instances was considered to be beyond the scope of this inquiry.

In the course of deciding cases in which academic due process was at issue, the courts usually were also called upon to decide on the substantive questions which had given rise to the procedural conflicts before them. Those disputes often involved concerns which, although closely related, were not central to this inquiry. The study treated such ethereal questions as those involving the first amendment rights of teachers and the consequent ramifications for academic freedom, "due cause" requirements in tenure cases, the procedures necessary in any attempted removals of tenured faculty, and the degree of proof required in terminating professors due to financial exigency, but only to the extent that their discussion clarified any procedural issue under consideration or contributed to the theory of private constitutional responsibility. Otherwise, there was no attempt to reach conclusions on those subjects. Similarly, while the discussion at various points included the topics of collective bargaining, racial and sexual discrimination, and student discipline, those issues were presented only to the degree that they contributed to establishing criteria for the judicial intrusion into administration-faculty procedural disputes; and their treatment was not necessarily represented as a statement on the status of the law on any of those subjects. Likewise, there was no reason to review additional cases which might add to an understanding of the law in those areas if they did not add to the subject of this study.

There were a few instances where writers made definitional distinctions between the words termination and nonrenewal of faculty contracts. In addition, the American Association of University Professors recommended different procedures when a probationary teacher was not being rehired as contrasted with the dismissal of a teacher before his contract expired. (115:6-7, 9-12). In the latter case, if the issue reached the courts, it would be a breach of contract claim; and if there were contractual entitlements to predismissal hearing procedures, they would serve as grounds for a legal challenge. In that regard, the proper "grounds" for an institution's failure to retain a faculty member under contract were no more clearly understood than was the meaning of "cause" for nonrenewal of a tenured teacher. Neither question, however, was the subject of this inquiry. When distinctions were made in the literature, they tended to be at the formative or theoretical stage of the writing. At the litigation stage of a dispute, the cases did not usually present the issue when a constitutional question was being argued. It was common for both writers and judges to use these terms, along with nonretention and dismissal, interchangeably. Neither the courts nor the writers made an issue out of distinguishing among these terms; therefore, they were also used interchangeably in this report.

From a due process perspective, the differences between colleges and universities and the differences among faculty academic ranks were not germane. Therefore, in this report there was nothing implicit in the use of the term college rather than university or in selecting the words teacher or instructor rather than professor. The relevant characterizations were public or private with regard to the institution and tenured or nontenured with regard to the professor. The term probationary was also interchanged with nontenured.

Definition of Terms

The language of the civil or private law has tended to be somewhat imprecise. The following definitions were applicable to the study and in several instances, after more background could be provided, were expanded within the text of the report.

Decisional law

Any of the formal decrees or judgments rendered by courts in their resolutions of disputes, and includes both the common and case law which have precedent influence.

De facto tenure

A status held by faculty members who are not formally tenured but who have come to anticipate the renewal of their contracts, absent notice to the contrary, because of policies established by the college or university administration and thus have grounds for a due process challenge. The status can exist even where the institution has formally declared that there is no tenure status.

Dictum

An opinion of a judge on some legal point not squarely before the court. Although it may be persuasive, since the court's opinions must always apply only to the facts, future courts are not bound by it. It is often an opinion on how the law would be applied if different facts or circumstances were present or if future events should be resolved in a certain way.

Discovery

A litigant's pretrial disclosure to the adverse party of facts or documents in his possession but essential to the other party's case.

Discovery is a defendant's right in most criminal courts and frequently a rule of procedure in civil cases.

Doctrine

A principle or tenet of the law which guides judicial opinion. While not necessarily binding, doctrines tend to be persuasive factors in influencing judicial decisions. Courts would not be likely to deviate from some of the entrenched doctrines except under unusual or extraordinary circumstances.

Due Process

A constitutional requirement that the government or its agents shall not deprive any citizen of life, liberty, or property without prior notice and the opportunity to be heard. Lacking in a precise definition, the Supreme Court has generally recognized due process as a command that laws be fundamentally fair, that they be neither capricious nor arbitrary, and that the means used to enforce them be related to the object of the deprivation. Therefore, the courts have divided the concept into the two broad categories of procedural and substantive due process, although the dividing line has not been clear. The study has also made reference to academic due process.

Academic due process. A mechanism which operates within an educational institution and is designed to protect a teacher's interests whenever his continued employment is threatened because of administrative action. Substantive due process is designed to protect the teacher from caprice and arbitrariness by the administration. However, substantive issues are not likely to be weighed if the procedural assurances are, as the hypothesis asserts, insignificant among the nontenured. In a different context, academic due process could refer to similar rights of students or of other school personnel.

Procedural due process. The central focus of this study, procedural due process concerns the extent to which one might be expected to suffer a loss from the deprivation of an acknowledged liberty or property interest and provides minimum protection in the form of prior notice and the right to a fair hearing.

Substantive due process. The substantive guarantee is concerned with whether the adverse government action is legitimately related to the furtherance of some governmental objective and promotes a governmental interest. The concept of due process has not been confined to a constraint on the government itself but can include other disputes where state or federal involvement or interests are implicated. The lack of clarity regarding the extent and nature of that requirement in nongovernmental settings was the justification for this study, which concentrated on the implications for the private academic community.

Financial exigency

A situation where economic reverses cause a higher educational institution to reduce its faculty and/or program offerings or to take exception to its tenure commitments.

Jurisdiction

The power of a court to hear and resolve a dispute. It can operate as an obstacle to litigation when a plaintiff cannot meet the burden of showing how an offense comes within the court's authority. Private autonomy has often been predicated on a lack of federal jurisdiction.

Positive law

Rules of conduct specifically enacted or adopted by official governmental authority, distinguished from concepts of morality or laws of nature.

Retrenchment

Temporary or permanent dismissal of faculty due to financial exigency or declining student enrollments.

State action

Functions performed by private parties which, because of state influence, implicate the private individuals or organizations as state agents with respect to that conduct. Therefore, state action could subject private parties to some of the same constitutional obligations as those of the state.

Tenure

A status awarded to faculty members who, after successfully completing a probationary period, are assured of continued employment unless they commit a serious institutional or legal infraction. The validity of an institution's claim that such a wrong had been committed by a tenured teacher would have to be defended by the college or university because of the tenured teacher's right to procedural due process.

Chapter Summary

Although the courts had traditionally exempted private entities from responsibility for constitutional mandates, since the mid-1960s their increasing receptivity to adverse litigation has cast doubt on the immunity of private activity. Due largely to their complicity with the state, the nongovernmental posture of some private colleges and universities has been successfully challenged by individuals affected by their policies and subject to their control. Since it had been suggested that academic administrators often failed to understand the extent of their potential constitutional responsibility, the likelihood of increasing judicial intervention into private action had emerged.

Some writers contended that despite the trend toward increasing private accountability, analysis of the decisions revealed a distinction between actions that were private and therefore not subject to the constitution and others which, though ostensibly private, could be regarded as public. Neither the proper bases for judicial review of private conduct nor the contours of due process itself had been well defined by the late 1970s. The inquiry was intended to foster an improved understanding of private constitutional responsibility and to determine and report the policies in New England's private sector for the purpose of assessing its vulnerability.

It was assumed that if nontenured teachers could obtain either constitutional or contractual grounds for challenges to their unilateral dismissals, the institutions would be protected to the extent that court-like procedures had already been made available. Because of their traditional autonomy, however, and because of the entrenched tenure systems in higher education, it was also assumed that private postsecondary institutions were not likely to have provided legally sufficient procedures for their nontenured faculty. It was hypothesized, therefore, that most private institutions in New England were not adequately protected against potential challenges by nontenured faculty. Research questions were asked as a test of that hypothesis.

CHAPTER II

REVIEW OF THE LITERATURE

Due Process: The Problem of Conceptual Equivocality

In 1950, concurring with the Supreme Court's majority in Joint Anti-Facist Committee v. McGrath (35), Frankfurter said that due process was neither a mechanical process nor a yardstick. Rather, he asserted that it involved a "delicate process of adjustment" and the inescapable "exercise of judgment by those whom the Constitution entrusted with the unfolding of the process." (35:163). In his delivery of the Supreme Court's opinion in the 1960 Hannah v. Larch (30) decision, Warren described the fleeting character of due process when he said:

> "Due process" is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. . . . Therefore, as a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. (30:442).

Having surveyed the body of decisional law as it had developed up to the early 1970s, Ashe and DeWolfe reported: "The only conclusion which can be drawn from these decisions is that procedural due process is an ineffable principle which is for the most part undefinable." (60:590).

As with most other significant constitutional provisions, according to Saphire, due process was intended to give expression to values which were fundamental, deeply held, and central to the framers' concept of democracy. Acknowledging that an ambiguity in the concept itself, as well as the values to which it relates, has provided a desirable flexibility, he suggested that they have also generated tensions with other libertarian principles which the Constitution was designed to symbolize and preserve. (106:111-12). While he agreed that different conditions permitted varying structures of due process proceduralism, Kirp contended that by definition, due process at least commanded rational inquiry into the circumstances of a dispute before attempting its unilateral resolution. (89:847). His analysis led him to conclude that due process was most often regarded as involving some type of opportunity for an aggrieved party to be heard and that:

> In the classic due process hearing, the disputants themselves, not the decisionmakers, largely determine what evidence bearing on the issue is to be introduced. The veracity of that evidence is tested through questioning of witnesses, a procedure structured to uncover both lapses of memory and falsehoods, conducted by an advocate skilled in this enterprise. During the course of this hearing, the decisionmaker acts only to contain the colloquy within the bounds of the actual dispute. He is a disinterested and impartial arbiter, constrained to reach a judgment based exclusively on facts presented at the hearing, with respect to which there has been an opportunity for rebuttal. His decision is a reasoned one that explicitly resolves disagreements concerning facts and relates a determination in the case before him to the governing rule. Subject to the availability of appeal, that decision is dispositive of the matter. (89:847-48).

Making reference to the hearing approach as a "cultural trait" in the United States, Kirp felt that it constituted a popularly held concept of due process, that it had an enduring appeal throughout several levels of society, and that it had been generally perceived as synonymous with justice. Moreover, he observed, the due process hearing has been considered more just than any of its alternatives. (89:845).

However, whether there was truly a generally held percept of due process, or rather, a general belief that there was a popular concept was an issue which, in Canavan's opinion, remained open and caused the term to become "a question-begging phrase and a slogan rather than a principle." (67:116). The problem of deninition, he concluded, has led to a distorted perception of "the process that is due." Its vitality, he persuaded, was relative to its purpose; and as a process, it had no substantive content. (67:115). Saphire argued against defining due process in terms of outcomes, however, contending rather that the interaction was an important process in its own right. (106:121). He advocated the adoption of some means for assessing the accuracy of information upon which faculty retention decisions were made (106:119) and provided his rationale for urging proceduralism beyond that which had been judicially imposed:

> Such assurance is basic to human dignity because it tends to prevent arbitrary, callous, and perhaps preventable mistakes or omissions, toleration of which would reflect a view that the individual is unimportant, and that what really counts are values born out of expediency, convenience and ease of administration. (106:119-20).

It was for similar reasons that Rood raised the issue of faculty morale as an organizational consideration to be weighed by educational institutions in deciding how much process was due to nontenured teachers. (105:138). Suggesting that faculty confidence and their sense of well being eroded quickly when termination of colleagues was done for no apparent reason, he wrote:

> When a terminated member is provided no chance to review his termination decision and present evidence on his own behalf, suspicions grow quickly that the administrators are acting from ulterior motives. Where such fears are aroused more time and energy may be spent by the faculty at special meetings and by the administration in attempting to alleviate apprehensions and to normalize activities than would be required to provide a formal hearing. Such costs to the institution ought to be considered in deciding to offer or not to offer a hearing. The temptation to provide only minimal legal requirements is to be resisted in deference to total institutional considerations. (105:138-39).

Furthermore, Kirp argued, the vitality of due process historically has not been dependent on the Constitution; rather it has been confirmed by it.

Therefore, he explained, while the Bill of Rights and legislative enactments have acted as constraints to adjudication, "the concept of due process is not so bounded." (89:845-46). In a 1978 Supreme Court statement on due process in Board of Curators v. Horowitz (14), Veron felt that vitality was lacking. (110:51).

Horowitz involved a graduate student who was dismissed from the University of Missouri-Kansas City Medical School because of faculty dissatisfaction with both her clinical progress and her personal hygiene, despite her otherwise excellent academic performance. Responding to her court challenge, which was based on both procedural and substantive grounds, the Court relied in part on criteria it had established in earlier decisions which involved nonrenewals of college professors' contracts. Beyond acknowledging the lack of any evidence of caprice or arbitrariness by the university, the Court refused to address the substantive questions because it found that the procedures followed by the university adequately met any due process the fourteenth amendment might have contemplated. The procedures to which the Court referred included both notification by the university of its dissatisfaction with her work and examination of her performance by a team of medical doctors with whom she had had little or no previous contact; but it did not include a hearing. Acknowledging that disciplinary dismissals sometimes require the availability of a hearing, the Court declined to impose similar commands on a university when academic questions were at issue, deferring instead to school officials' judgments which were academically more "subjective and evaluative" than "factual." (14:950-56). Rehnquist, who delivered the opinion, pointed out that the Supreme Court has frequently rejected any attempt to promulgate an inflexible and universally applicable concept of due process procedures; and that in cases where decisions were more subjective, they were less amenable to formalized hearings. (14:953).

In an article that preceded the Horowitz decision by five years, Canavan had cautioned that procedures intended to prevent one injustice, in practice, have sometimes fostered a greater one, such as inhibiting an educational institution's ability to continually upgrade its teaching and research integrity. (67:116, 118). He felt that rigid adherence to legal concepts of due process, because they had different objectives, were often inappropriate to schools because: "a university is not the same kind of institution as the state, and the procedures proper to the criminal courts can have ill effects if insisted upon in the schools." (67:116). In Horowitz, Rehnquist echoed: "A school is an academic institution, not a courtroom or administrative hearing room." (14:954).

O'Brien also resisted any notion that professors at either public or private institutions should be confined in their procedural entitlements to the positive law. He felt instead that all personnel should be entitled to procedural safeguards because of a time-honored "natural law and natural justice" rather than any positive legal enactment. (97:176). While he made a similar assessment (106:117-19), Saphire found that the Supreme Court of the late 1970s had not only given exclusive recognition to rights created by the positive law, but through its decisions, individual protections had become limited by the same statutes which created them. This was in contrast to personal rights being expanded by continuing constitutional interpretation. (106:130). Fearing that such development gave the legislative branch the power to give and to take away liberties without the due process cushion, he concluded:

> In essence, this methodological shift represents a full circle return to the interpretation given by the medieval English courts to the "law of the land" clause of the Magna Carta--thus reducing due process to a bare assurance of legal process. Such an approach was expressly rejected by the Court 120 years ago. (106:140).

Saphire also criticized the Court for what he termed an exclusive and blind concern with substantive issues. (106:172). However, while describing Horowitz as a conceptually "weak precedent," Veron detected a perpetuation of the flexibility which had characterized the concept over the last two decades. Noting that the nine justices who participated in the decision expressed contradictory and conflicting views as to the commands of due process, he observed that they, nevertheless, all considered a series of letters and meetings to be adequate protection. (110:51-53). He speculated: "The reaffirmation of due process flexibility in Horowitz means that the contours of due process on campus, especially in the academic context, will be largely shaped by the university community itself. (110:53-54).

The relevance of the due process issue as it affected nontenured professors in higher education assumed new dimensions in 1972 with the Roth and Sindermann cases (85:559) discussed later in this review. (infra 45). For a perspective on the implications as well as the limitations of these decisions, it was helpful to examine two interrelated phenomena which had previously characterized judicial posture toward constitutional applicability in higher education: a pervasive judicial restraint philosophy and the privilege doctrine. They were given respective treatment in each of the next two sections.

Judicial Restraint Toward Intervention in Postsecondary Education

In his lament over a growing judicial encroachment on traditional institutional autonomy, Brubacher reminisced a time "when higher education was a self-governing community, and internally, a law unto itself." (66:267). He maintained that cases dating from the turn of the century have revealed a reluctance by the bench to intrude into the affairs of education. Unless a specific constitutional issue was at stake, he noted, judges preferred to leave questions of educational policy to specially designated bodies, such as boards of regents or of trustees, rather than weighing the merits of questions which they deemed outside of their own competence. (66:267-70). Pacenza also found a disposition by the courts to approach "delicate issues concerning the academic community" with a special caution. (100:61). In fact, the only important generalization that Veron felt could be drawn from his analysis of Horowitz was that in 1978 the Supreme Court was still sensitive about its own interference with school administration. (110:51).

According to Faccenda and Ross, the Supreme Court's historical avoidance of intervening in educational controversies was due to its belief that school officials possessed inherent authority to govern their own internal affairs. (74:542). Aiken hypothesized that the traditional college and university invulnerability to legal challenges was less a product of law and more the outgrowth of a "benign social environment" in which education was a privileged function. (58:128). He opined:

> Had public attitudes toward educators and education been less tolerant of their claims to a rather paternalistic autonomy, or more critical of their general reputation for high virtuosity and inscrutable wisdom, it is likely that much wider avenues of challenge to educational policies and practices would have opened up much earlier; and that in consequence, education would have made its own adjustments to the problem of legal responsibility less abruptly and more efficiently. (58:128-29).

As a partial explanation of the motivation for its restraint posture, Saphire found that because the Supreme Court, as the ultimate interpreter of the Constitution, had been less responsive to the populace than had been the executive and legislative branches, its decisions had been regarded as peculiarly suspect in a democracy. Therefore, its definitions of the content and scope of due process were characterized by Saphire as cautious, gradual, cognizant of a duty to preserve the restrictions on government power, and made with regard to its own delicate role in the constitutional scheme. (106:112). To place some perspective on the Court's tendency to issue decisions generally confined to the facts before it, VanAlstyne explained:

> The formulation of degrees of pretermination procedural due process immediately responsive to the very particular facts of each case . . . accurately reflects the Supreme Court's method of constitutional analysis of such matters. Initially, moreover, it seems entirely proper that constitutional courts should lay heavy emphasis upon the special facts actually present in each case in determining what due process may require under the particular circumstances. The duty of the court is, after all, only to answer on the case that grants it authority to speak at all. It is rather for legislatures or rule-making administrative agencies to provide justice by larger categories--justice wholesale--through the enactment of broad rules more or less inclusive of only roughly similar activity. (109:874).

Twentieth century experience with both the judiciary and the state legislatures was characterized by Bakken as a time of "forcefully asserted" deference to the university's rule-making power. (62:207). Litka reported, however, that in the late 1960s and the 1970s numerous confrontations with faculty and students caused the courts to become increasingly concerned with a need to reexamine their abstention policy. (91:268). Concurring, Faccenda and Ross attributed much of the increase in incidences of judicial receptivity to review academic disputes to government's desire to protect the constitutional rights of students, faculty, and employees. (74:539).

The faculty constitutional liberties traditionally guarded by the federal courts, according to Bakken, have been the first amendment rights of free speech and association, which also implicated fourteenth amendment claims to due process. The state courts, he observed, have granted similar procedural relief to faculty who qualified under state tenure statutes. (62:203-4). Frakt pointed out that the federal judicial restraint was also lessened in the face of tenure status because the qualifying teachers then acquired a constitutional claim. (78:37, 43). Courts have declared that tenure statutes created a property interest which could not be abridged without fourteenth amendment procedural safeguards. (93:616).

Although he otherwise described the judiciary's restraint philosophy as a "commendable reluctance," O'Brien felt that the concomitant denial of constitutional claims for untenured teachers amounted to an unreasonable distinction. (97:178). Expressing a similar view, Frakt concluded that the emphasis on tenure rights had obscured the need for constitutional protection of probationary teachers. (78:27).

Not only the courts, Litka observed, but also the institutions themselves had regarded the appraisal of instructor competence to be a judgment which did not lend itself to hearing procedures. (91:268). Making a similar observation, Palmer noted:

> It would seem reasonable to assume that the school or university places more than a passing value on autonomous conduct of its affairs. If it is then forced to answer for its judgment to the courts, it will lose a degree of this autonomy. While this statement is true, it is also plain that the days of absolute sovereign rule are ended, and there are, in fact, certain limitations on the freedom of activity of school systems. (101:475).

The cases which prodded judges to appropriate some of the administrative exclusivity, according to Bakken's report, involved disputes which affected a federal interest higher than that of abstention. (62:203).

As inquiry proceeded into the kinds of higher federal interests which had been sufficient to activate judicial participation in higher educational policy, a separate but related traditional barrier to seeking constitutionality as a basis for court resolution was revealed: the privilege doctrine.

A Lessening of "Restraint" for Teachers at Public Institutions

Partly as a product of their restraint posture, according to Dolan, for many years the judicial branch's attitude regarding nontenured teachers in public education was similar to that of other government employees; that is, characterized as a master-servant relationship to be "commenced, continued, and terminated on such conditions as the government may determine." (71:656-57). Ashe and DeWolf reported that the view of public employment as a concession dominated public employee relations for the first half of the twentieth century and was attributed to Holmes, who proclaimed in 1892 (37:220) that although one had a right to free speech, he did not have a right to a government position. (60:561-62). This right-privilege dichotomy, Palmer explained, prevented a substantive first amendment claim from serving as the basis for entitlements to fourteenth amendment procedures. (101:469-70). The privilege doctrine was reaffirmed by the Supreme Court in Bailey v. Richardson (11) in 1951 when, in an equally divided opinion, they sustained a lower court's denial of a terminated public service employee's eligibility for due process for lack of any life, liberty, or property interest in his job. (11:918).

A Harvard Law Review study on developments in the law reported the demise of the doctrine effective with the 1956 Supreme Court's Slochower

v. Board of Higher Education (52) decision. (70:1079). In that case the due process challenge was predicated on a New York City charter provision which denied the fifth amendment self-incrimination immunity to city employees in regard to their official conduct. (52:552-53). A tenured associate professor at Brooklyn College had been summarily suspended from his position shortly after he exercised his prerogative in testimony before the Internal Security Subcommittee of the U.S. Senate regarding his alleged Communist affiliations some time prior to his employment at the college. (52:553-54). The Court refused to allow the exercise of a constitutional right to be the basis for the sanction of a government job and declared the summary dismissal a denial of due process. (52:558-59). Clark delivered the Court's opinion, stating:

> The problem of balancing the state's interest in the loyalty of those in its service with the traditional safeguards of individual rights is a continuing one. To state that a person does not have a constitutional right to government employment is only to say that he must comply with reasonable, lawful, and nondiscriminatory terms laid down by the proper authorities. (52:555).

Rather than emphasizing the liberty or property issues, the Harvard Law Review noted, it was contended that to enforce the statute which permitted summary dismissal would have been to deny the teacher other constitutional promises. Nothing in the decision foreclosed per se the possibility of summarily dismissing government workers, including teachers, for other reasons. The speculation reported in the Review was that the Court possibly minimized the liberty and property questions because of "right to teach" issues which would have emerged. (70:1079-80). DeVaughn pointed out, however, that seventeen years later when the Supreme Court made reference to Slochower, they asserted that the teacher had a protected property interest only because of his tenure status. (69:310). The Review acknowledged, at a minimum, that public employees did acquire the right, through this ruling, to protection against indiscriminate government action where a substantive liberty was involved and due process had been denied. (70:1078-80). That reasoning has reportedly acquired some judicial status as the doctrine of unconstitutional conditions. (60:564). Frakt's analysis of cases in education since the mid-1950's decision in which the judges have confronted the privilege barrier showed that courts have tended not to let the privilege-right bifurcation issue obscure the more pertinent problem of "state interference with positive constitutional safeguards." (78:30-32). Ashe and DeWolf found some indications in 1974, however, which suggested that the Supreme Court might be attempting to revive the privilege concept. (60:563-64).

In 1957, the year after Slochower, the Court was faced with another higher education constitutional contest, this time involving the question of the proper limits that could be placed on legislative probing into the private affairs of an individual. (54:235). Rather than a fifth amendment issue, Sweezy v. New Hampshire (54) concerned a denial of due process on the refusal of a faculty member at the University of New Hampshire to answer questions which were not pertinent to a legislative inquiry into subversive activities in the state. For its inability to extract the answers from Sweezy, a New Hampshire superior court ordered his incarceration and the state's highest tribunal affirmed. (54:244-45). Without derogating the importance of first amendment rights to all citizens (54:250-51), the Supreme Court reversed New Hampshire's decision and took particular exception to its own restraint philosophy toward higher education where threats to freedom of inquiry were involved. In a continuing departure from the privilege concept and carrying on the balancing test, Warren wrote for the Court:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die. (54:250).

In 1961 the Supreme Court found the summary dismissal of a private worker at a U.S. Naval installation not violative of due process, however, despite the lack of a statement of reasons or a hearing to refute them. (78:35-36). Cafeteria Workers v. McElroy (18) involved a food service employee at a highly classified Washington, D.C., gun factory who was deemed by its security officer as having failed to meet minimum security requirements and was consequently required to forfeit her identification badge and thus her job at that location. (18:886). In upholding lower rulings, the Court noted that the traditional unilateral authority of officers at such high risk locations had been reinforced by both the Constitution and statutory enactments. Noting that while such authority did not permit capriciousness, the requirements of due process were affected by the government function as well as the private interests. (18:894-98). Delivering the Court's opinion, Stewart rejected a contention that the officer's actions constituted the denial of a protected liberty and concluded:

> Finally, it is to be noted that this is not a case where government action has operated to bestow a badge of disloyalty or infamy, with an attendant foreclosure from other employment opportunity . . . All this record shows is that, in the opinion of the Security Officer of the Gun Factory, concurred in by the Superintendent, Rachel Brawner failed to meet the particular security requirements of that specific military installation. There is nothing to indicate that this determination would in any way impair Rachel Brawner's employment opportunities anywhere else. (18:898-99).

O'Brien contended, to the contrary, that in the academic community future opportunities were significantly impaired as the result of an unexplained termination. (97:189). An analysis of subsequent cases convinced Palmer that considerable difficulty had been encountered by nontenured teachers who attempted to fulfill their burden of proof that they were denied substantive constitutional rights. He also found the remedy of damages an inadequate form of relief for the loss of a teaching position. (101:470-71, 477). Agreeing with both of those appraisals, Frakt contended that nonrenewal of a teacher usually created the onus of a lack of competence. He therefore proposed that such result should be a consideration in determining what constitutes due process. (78:39). The degree of total hardship inflicted on an employee, VanAlstyne noted, had weighed heavily in Cafeteria Workers as well as in several other Supreme Court decisions concerning the constitutional necessity of pretermination hearings and what character the attendant procedures should take. (109:866-69). Palmer viewed the Court's balancing approach as having supplanted the right-privilege test. (101:470).

A public school board attempted to suppress the first amendment rights of one of its teachers in the 1968 case Pickering v. Board of Education. (46). In this instance they had provided a full hearing regarding his newspaper publication of a letter critical of their policies; but the Supreme Court reversed the board's dismissal, Ashe and DeWolf contended, because their action imposed "unconstitutional conditions." (60:569). VanAlstyne cautioned, however, that malevolent motivations and malicious statements by the teacher could have been incriminating. (109:856). The Pickering decision, Matheson cautioned in agreement, did not give college teachers a limitless prerogative to criticize their superiors on all subjects and in all circumstances. Rather, he noted the continuing emergence of a "balancing test" between the employer's and the teacher's interests. (93:609). While conceding that no precise balancing test had ever been formulated by the courts, Ashe and DeWolf suggested that Pickering set forth two criteria which had some precedent applicability. They were that the speech would be likely to enjoy protected status to the extent that it was (1) not directed at those with whom the teacher was in daily contact, thus disruptive of the organization, and (2) concerned with a public rather than a private issue. (60:578-79). Wheeler commented that, at the least, the effect of the Court's decision was to bring teachers into the constitutionally protected compass of statements against which retaliatory action could not be taken in contravention of not only first but also fourteenth amendment proscriptions. (111:72-74).

By contrast with the "liberty" guarantees expressly provided in the Constitution, fourteenth amendment "property" interests were derived from other sources. In 1970 in Goldberg v. Kelly (25), for example, the Supreme Court found that a protected interest in welfare benefits had resulted from a citizen's meeting the state of New York's predetermined criteria for such entitlements. Therefore, before a beneficiary could be deprived of further payments, the Court held that she must be accorded adequate notice, a statement of reasons, a meaningful opportunity to be heard and to present contradictory evidence, the right to counsel, and an impartial decision maker. (25:267-71). The Court again emphasized that the nature of the hearing was affected by the essentiality and urgency of the recipient's impending loss. (25:268-69).

A balancing approach weighed in favor of the institution in the Fifth Circuit Court's deliberations on the integrity of internal procedures which had been observed by the administration of a state college in Texas. (23:859). In Ferguson v. Thomas (23), decided in 1970, a nontenured professor alleged that nonrenewal of his contract was due to his exercise of the protected rights of expression and association and that the particular collegiate procedures employed constituted a denial of due process. The Fifth Circuit did not find an abridgment of any first amendment liberties, but they did find that the university's pre-established regulations had created an entitlement to continued employment sufficient to invoke the fourteenth amendment. After being placed on probation without notice by the college president and later being notified that because of his ineffectiveness his services would be terminated when his contract expired, Ferguson requested and was granted a hearing before the Board of Directors of the Texas A. & M. University System. The Board allowed both the president and Ferguson to explain their positions but refused to hear two witnesses requested by the teacher. Subsequently it also declined to interfere in the matter, declaring it to be administrative. (23:853-56).

Because of the college administration's own concession that university regulations required it to show cause for nonrenewal decisions, the Court ruled that the professor had acquired a constitutionally protected interest in his continued employment at the institution. The Court concluded that the University officials, by their own regulations, had created an expectancy of reemployment in the teacher sufficient to entitle him to fundamental procedural due process before being deprived of his position. However, since the district court, contrary to what the Fifth Circuit Court considered good judgment, had permitted the suit rather than remanding it to the institution for resolution and had provided a full evidentiary hearing on the facts, the higher panel did not reach the question of adequacy of the institutional procedures. (23:856-58).

Foundations for Professorial Challenges in the Public Sector

With the gradual demise of the privilege doctrine in the 1950s, Myricks and Hodinko observed, was the accompanying emergence of the "liberty" notion with respect to government service. (95:9). As with other citizens, teachers' due process challenges were predicated on their constitutionally protected right to freedom from exploitive or repressive actions by the government. The privilege doctrine had been a denial that public servants were in full possession of the protections since, in their case, the government was also their employer. An annihilation of the doctrine would, therefore, place teachers who were employed by state institutions in essentially the same position as other private citizens with regard to their contracts with the government. Concomitantly, it would increase public institutional vulnerability to constitutional challenges from the professoriate. It was this state of affairs which precipitated what Ashe and DeWolf described as a "conflicting and confusing" debate (60:581) in the educational law community throughout the 1960s on the existence of fourteenth amendment "liberty" and "property" interests among teachers in public higher education.

From the Supreme Court's decisions which led to its apparent abandonment of privilege as a bar to constitutional relief, Dolan described two decisional methods in what he termed "the contemporary judicial manner of dealing with dismissal cases" as they had developed toward the conclusion of that period. (71:659).

> The courts will review the record to determine whether a substantive right has been abridged, and then will determine whether the due process standard has been met by balancing the competing interest involved. This decisional method, as indicated by Pickering, is well established when the basis of the claim is an alleged violation of a specific constitutional provision, such as First Amendment freedom of speech. Another decisional method, invoked whenever possible to avoid reaching constitutional questions, is to use statutory and contractual provisions as a basis for redress; this approach may be necessary when state action is not present. When an injured party is unable to predicate his claim on one of these bases there is less willingness on the part of the courts to extend relief, a situation reminiscent of the reticence noted earlier during the prevalence of the privilege doctrine. (71:659-60).

Frakt pointed out that while administrators could not take action against faculty members for reasons which were unconstitutional, teachers were still not per se entitled to pretermination hearings because they had never acquired any right to initial employment. Therefore, if no reasons were given for their nonrenewal, they would ordinarily have no standing for a constitutional challenge. He also suggested, however, that the developing judicial philosophy had shifted the burden of proof to the extent that if a teacher could establish a prima facie case of unconstitutionally motivated dismissal, the administration was often compelled to provide procedures for demonstrating the contrary. (78:44-45). Myricks and Hodinko witnessed in the judiciary of the 1960s a special willingness to liberalize their tests of due process entitlement for teachers without tenure since that group usually had no other protection. (95:10-11). Furthermore, given the judiciary's distaste for politically motivated threats to teacher job security, VanAlstyne noted that the trend of decisions affecting the public sector during the same period showed a tendency to resolve doubtful cases in favor of the professor. (109:846-47). To illustrate his point he added:

> Specifically, political disclaimer oaths, bans on membership in feared or hated political organizations or unions, discharge for extramural criticism, and dismissal or revocation of teaching certificates for private behavior not specifically shown to affect the teacher's professional competency, his intramural working relationships, or his classroom integrity gradually have all been rolled back by judicial decree. (109:846-47).

Nevertheless, VanAlstyne expressed doubt concerning the adequacy of resolving academic disputes through court rather than internal procedures. He emphasized the "exceedingly difficult" burden of proof imposed on teacher-plaintiffs as well as the usual damaging time lapse from job separation to litigation. Irrespective of whether or not the courts' decisions were favorable to them, he asserted, teachers were inhibited by the adverse public notoriety accompanying public trials and, in any event, were "not litigious by nature." (109:859-60). Whatever the merits of the last observation in regard to the late 1960s, Bakken noted that teachers had become "litigious" in the next decade. (62:207). Rood elucidated:

> While the courts seem an unlikely place for the academic community to solve its problems, courts may be the only hope of a terminated faculty member who desires to continue his profession. To these individuals, the advice against going to court is advice to acquiesce in an unacceptable situation. (105:148).

The privilege and restraint obstacles to resolution through tribunal having been partially negated, a more positive basis for "approaching the bench" had accompanied due process litigation into the 1970s.

The Roth and Sindermann Influences on Due Process

In what Jascourt called "precedent setting" (85:559) and Ashe and DeWolf referred to as "landmark rulings" (60:582), the Supreme Court, in 1972, agreed to hear Board of Regents v. Roth (15) and Perry v. Sindermann (45) which it decided consecutively on June 29. (15:564, 45:593). During the preceding decade, even with the prevalence of the privilege doctrine, according to Saphire, the Court had not placed heavy dependence on a liberty or property inquiry in due process cases. He reasoned that they had apparently presumed such to exist, at least in part, in cases where the state was attempting a unilateral divestiture of some benefit. However, in the 1972 cases, he stated that the Court departed from that approach. (106:127). Consistent with the developing justification for its abandonment of the privilege concept, Ashe and DeWolf observed that the Court established at the outset that due process protection was to be available only where the deprivation of a protected liberty or property interest could be shown by the plaintiff. (60:583).

Roth involved a challenge by a nontenured, first-year faculty member at Wisconsin State University at Oshkosh against his nonrenewal with prior notice but without a statement of reasons or any internal procedures. He supported his contest on grounds that (1) the action allegedly was intended to be punitive and was in retaliation to captious statements he had made about the administration, thus a first amendment abridgement, and (2) the lack of notice and hearing violated his claimed fourteenth amendment procedural due process right. Although both the district and appellate courts granted judgments in his favor, the Supreme Court reversed because they found no protected liberty or property interests sufficient for him to invoke procedural entitlements. (15:566-69).

The district court had arrived at its summary judgment in favor of the teacher after applying a "balancing of interests" analysis. However, the highest panel, while conceding the validity of that approach for establishing the character which appropriate procedures would need to assume, ruled that such examination should only be made after a preliminary positive determination that a protected liberty or property interest had been present. (15:570-72). There had been no finding by the district court that the nonrenewal resulted from his public statements. The Supreme Court acknowledged a "freedom to engage in the common occupations of life" in Meyer v. Nebraska (42), a 1922 case, but found no charges, such as dishonesty or immorality, as would damage his reputation or stigmatize him in regard to possible future employment. As with the cook in Cafeteria Workers, the Court refused to find the denial of a particular position as tantamount to the deprivation of a liberty where the teacher was free to seek the same type of employment elsewhere. On the question of property, the Court held that such interests were not created by the Constitution but could be acquired by (1) meeting pre-established standards of eligibility, (2) a grant of tenure, (3) terms of a contract, or (4) in the absence of a contract, a clearly implied promise of continued employment (15:576-77), none of which had been met by Roth.

A junior college professor, in Sindermann, took action against the administration at Odessa Junior College, a part of the State College system in Texas, challenging the nonrenewal of his contract on essentially the same constitutional grounds as those alleged in Roth. Sindermann had been in the state system for ten years, the last four of which were at Odessa where he was retained by a series of one-year contracts. The administration's nonrenewal decision took place after the teacher had become active in the local teachers' association, left his classes without permission in order to attend legislative committee hearings, and published a newspaper advertisement highly critical of the Regents. Since no hearing had been provided, he claimed the alleged free speech abridgement also constituted a fourteenth amendment violation. Because Sindermann had not been granted formal tenure, the district court granted summary judgment in favor of the institution; but on appeal the Seventh Circuit Court reversed, ruling that tenure was not a prerequisite to protected speech and also that failure to provide a hearing could violate due process if there had been an expectancy of reemployment. (45:594-97).

Referring back to Pickering, the Supreme Court held that a valid constitutional claim had been presented, but complained that by granting a summary dismissal, the district court foreclosed any opportunity to determine if the administrative action had been valid. (45:598-99). Consistent with their Roth holding, the highest Court proclaimed that while the lack of formal tenure or contractual security was immaterial to the free speech issue, it was "highly relevant" to the procedural due process question. Sindermann had supported his challenge on published college policies on which he said he had relied for his expectancy of reemployment, thus creating a de facto tenure and therefore a right to pretermination procedures. (45:600). Although the Court rejected the Appellate Court's contention that any asserted due process claim would entitle a professor to a hearing (45:599, note 5), they affirmed its reversal and reaffirmed their own prior statement that such a claim could be supported by "rules or mutually explicit understandings." (45:601). Stewart, who gave the Court's opinion in both cases, explained:

> A teacher, like the respondent, who has held his position for a number of years, might be able to show from the circumstances of this service--and from other relevant facts--that he has a legitimate claim of entitlement to job tenure. Just as this Court has found there to be a "common law of a particular industry or of a particular plant" that may supplement a collective-bargaining agreement, . . . so there may be an unwritten "common law" in a particular university that certain employees shall have the equivalent of tenure. This is particularly likely in a college or

> university like Odessa Junior College, that has no explicit tenure system even for senior members of its faculty in practice. (45:602).

Stewart emphasized further that Sindermann's claim could have validity if supported by the "policies and practices of the institution" but added that proof of such property interests would only obligate the college officials to grant him a hearing if he requested it. It would not entitle the teacher to reinstatement. (45:603).

Although the boundaries had not been set, litigation which preceded the 1970s established that professors at state institutions were entitled to some measure of constitutional latitude. If the decade was ushered in with a somewhat clearer definition of pedagogical privilege, however, in Wise's view, Roth and Sindermann had narrowed its parameters. (113:686). Likewise, Rood's survey of later decisions revealed that, despite the judiciary's expansive view of the first amendment in higher education, it had given no professorial shield against administrative prerogatives to establish both institutional philosophy and acceptable teaching style and methods. Thus, disruptive nontenured teachers continued to face proper separations from their institutions with or without a hearing. (105:144-48). Moreover, despite a popular view to the contrary, Brown noted that the two pivotal cases had neither created the right to court review nor obviated the need for internally designed procedures. His review of subsequent cases demonstrated that for a substantial portion of faculty members, the judicial pronouncements had created a false sense of security. (65:300-307).

Disparaging what he considered constricted definitions of liberty and property by the Roth Court, Wise noted that that decision had, nevertheless, not removed any substantive rights which had already been established in prior holdings. (113:686, note 8). What had been determined was the need for an initial two-step analysis: first, the determination of whether a substantive liberty or property right had been abrogated; and secondly, if so, a balancing test to establish the nature and scope of the due process which was owing. With respect to the liberty interest, he explained that the type of state interference against a teacher's "freedom to pursue a career," which would not enable the college to sustain a challenge, could be such charges as would (1) damage his community standing or associations and/or (2) foreclose future employment opportunity. (113:689-92). A "multitude of state and federal court actions," Ashe and DeWolf observed, have subsequently been founded on Roth's two criteria for determining whether nonrenewal would constitute a deprivation of liberty. (60:588).

In a footnote the Roth panel refuted an assumption made by both lower courts that the teacher's nonretention would per se have a substantial adverse effect on his future employment opportunities. (15:574, note 13). They had already pointed out that if such had been the case, it would have presented them with a different issue. (15:573-74). DeVaughn interpreted these comments as an extenuation of their harsh ruling and an indication of their desire for evidence to that effect in similar future claims brought before them. (69:308-9). Wise admonished, however,

> So long as the university is careful not to reveal the real basis on which it acted, when to do so might accuse the teacher of serious wrongdoing, the teacher is, according to the Court, powerless to attempt to clear his name. Non-renewal unaccompanied by a specific charge of serious wrongdoing may, therefore, be just as damaging to professional reputation as non-renewal where specific charges are made. (113:693).

O'Brien, in considering the special problems of older teachers who, after nonrenewal, attempt to transfer to a new college, complained, "It is unfortunate that the Roth case was such a frail vessel for carrying to the high Court issues so freighted with significance." (97:194). Questioning the analytical consistency of the decision, Palmer considered it a weakness that while damaging statements called for a hearing, if the administration simply said nothing in its failure to renew a nontenured professor, "he is left to argue in a vacuum." (101:474). If their fears appeared groundless, Reutter, in an administrative research bulletin, forewarned the readership:

> . . . it is legally crucial for administrators to see to it that nothing is said which could be construed to damage the nonretained teacher's character, nor to impair his getting another position. It would seem perilous to discuss with parents, students, press, or teacher association representatives why a teacher is not being rehired. Anything said, or represented as having been said, that would damage the teacher's good name would warrant a hearing (but not, as noted above, a rehiring). (104:2).

Subsequent Supreme Court decisions, Brown noted, held that despite the falsity of charges, liberty interests were not impaired when the reasons had not been made public. (65:303). Rood confirmed that in following years, public institutions had not become vulnerable to faculty due process challenges so long as they either made no statement of reasons or confined their comments to appraisals of the teacher's performance. Moreover, courts had not interfered even with frank discussions of a faculty member's character when the discussions were confidential and internal. (105:136-38).

In observing the high Court's treatment of property and liberty interests as being capable of supporting independent causes of action (60:587), Ashe and DeWolf also isolated the criteria for the Court's requisite "objective standard" for determining whether or not the property interest was present. (60:585). They were referring to a position taken in the Roth case in which Stewart had insisted:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims. (15:577).

In view of that standard, some unanswered questions were raised by DeVaughn regarding institutional vulnerability where a professor might have acquired identifiable property interests. A teacher, for example, who, after sufficient longevity had established death benefits for a spouse or who, as a late entrant in the profession, was within a few years of qualifying for a pension might raise the vested interest issue. There might be rights in property for a nonretained teacher who felt he had met a school's published retention standards. (69:310). DeVaughn pondered further:

> Would a professor have established property rights requiring full due process absent "sufficient cause" when he had, as an employee of a university, established a significant legitimate consultant practice? . . . Would a professional educator who had from his prominent base of employment or position established a significant and remunerative publication record have a significant judicially established property right demanding notice of specific reasons and full due process hearing? . . . Would an institution have greater legal latitude if it announced no standards for retention and wrote into its contract the rights of unilateral decision in contract renewal? (69:310).

The following year after DeVaughn's query, Marshall expressed an almost identical sentiment with respect to the insurance and retirement benefits in his dissent to the Supreme Court's 1974 Arnett v. Kennedy. (10:65).

The property interest that a faculty member might obtain through what the Sindermann Court had called the "unwritten 'common law' in a particular campus" was taken from a labor-management perspective. (45:602). On the basis of that point of reference, Bakken examined the "common law" concept in higher education in a collective bargaining context. He pointed out that the Supreme Court had actually made reference to two different sources of campus common law. (62:201-2). One was that which supplemented a collectively bargained contract (45:602); and the other, conceived in local custom, was based on the policies and practices of the university. (45:603). Bakken's analysis suggested that the two sources of the Court's analogy were in conflict. (62:202-8).

The supplementary common law would be predicated on past practice, Bakken explained, and would be the basis for interpretation of formal agreements. In some circumstances firmly established past practice had been known to pre-empt written provisions to the contrary. In had been binding on the parties to the extent that it was promulgated by management and had received the bilateral participation of both parties. The other form of campus common law originated from an associational rather than from a declarative experience and, unless given legislative or judicial recognition, it was binding only on the participating members, such as a committee, a department, or a separate school. However, a conflicting university rule had always taken precedence. Describing Sindermann's "'common law' in higher education" as the "ultimate catch-all," he predicted that any attempts to extend the concept beyond the immediate locale would be both unworkable and unenforceable. The reasons, he asserted, were because local past practices were binding, and rules pertaining to contracts and conflicts of laws were not uniform among the states. (62:205-8).

Using the implied conditions rationale regarding contractual intent, Finkin suggested that hearing standards promulgated by the American Association of University Professors influence collegiate expectations (76:351) and submitted that a:

> . . . common understanding within the trade or profession has long been recognized as refining the meaning of contract terms. The American professoriate has over more than sixty years developed and refined to a relatively sophisticated degree a "common law" of its own. (76:351-52).

However, Rood noted that while the AAUP standards had "great moral sway" within the academic community, unless they had been made part of the contract of the college handbook, they had received no recognition from the courts. (105:146). Furthermore, he found that procedures would continue to be considered adequate even when they deviated from the faculty handbook if the faculty member agreed to them. (105:139).

When Stewart delivered the Roth opinion, he stated that property interests were not created by the Constitution. (15:577). DeVaughn pointed out that while Roth's procedural claim was lost because he was a first-year teacher, Sindermann's right to a hearing was granted because he had already qualified for a tenure-like interest under administratively promulgated policies of the state system. (69:305). Concurring that the understandings must derive from administrative sources, Ashe and DeWolfe were also cognizant of the Court's acknowledgment that claims to de facto tenure would not necessarily be destroyed if the likelihood of longevity had not been made explicit. They noted that a teacher's reliance on the acquisition of such superior status could be justified by an objective appraisal of existing policies. (60:587). Saphire's examination of Roth-based litigation showed that while promises of procedural safeguards created a substantive interest, express provisions could effectively provide to the contrary. (106:130). Thus, in his analysis of the developments since Roth and Sindermann, Rood found that legally cognizable expectancies of reemployment had occurred almost exclusively at colleges and universities where there were no tenure systems in effect. At tenure-granting institutions, probationary status, by definition involving a trial period, carried no implied expectancy of reemployment: hence, no de facto tenure. (105:132-33). The credence which Stewart had given to a reliance on de facto tenure was supported in part on the teacher's having held his position for a number of years. (45:602). Brown discovered, however, that as judicial reasoning subsequently evolved, it tended to distinguish between the statutory form of tenure and the "permanent status" one acquires with length of service. The latter, Brown observed, has sometimes been interpreted as a descriptive rather than a "rights-granting" attribute and has thus provided little expectation of entitlement to pretermination hearings. (65:302). Ashe and DeWolfe explained:

> . . . in the absence of either explicit or implicit tenure systems, regardless of the fact that a teacher has been continuously employed in a series of contracts of express duration, a teacher does not necessarily possess a protected "property" interest entitling him to further employment when the contracts expire. The single utmost important factor for a teacher to prove in seeking to establish the existence of a constitutionally protected "property" interest in continued employment is that there exists, either explicitly or implicitly, objective rules or understandings, which would provide a reason to expect continued employment absent sufficient cause to the contrary. (60:587).

Rood's research confirmed that no period of service during the time of probation could, by itself, establish a property interest. (105:134).

Public institutional vulnerability, then, was more likely in instances where a professor could attribute a deprivation of one of his liberty or property interests to unwarranted action by the college or university. Such violations could occur where an institution attempted to either impose unconstitutional conditions on the teacher's continued employment or breached his justifiable expectancy of contract renewal.

While a high degree of specificity was not possible, it was found that unconstitutional conditions could exist where a right expressly guaranteed by the Constitution had been limited without a legitimate reason which was rationally related to the proper goals and functions of the institution. Perhaps in all sectors of the society, but especially in higher education, free speech was held in highest regard by the courts. Therefore, attempts to constrain a teacher's extramural utterances could only be supported by substantial evidence that the speech was maliciously motivated or harmful to the teacher's classroom or organizational effectiveness. An actionable interference with the faculty member's freedom might also occur where statements made by the administration were outside their area of expertise and unnecessarily thwarted the teacher's future employment opportunities. Therefore, since there was no requirement that instructors be given any reason for their nonrenewal, institutional vulnerability could be minimized by failing to do so or by giving them only at the request of the faculty member, by confining statements strictly to appraisals of teaching performance, and by keeping the communication otherwise confidential and internal.

A teacher's claimed expectancy of contract renewal was less likely to be convincing in court where there were institutional policies which expressly differentiated between probationary and nonprobationary faculty. Even if the distinction was blurred, however, de facto tenure could only result from conduct by the administration, including its promulgation of rules, policies, and practices. It could also be objectively construed as having created the justifiable expectancy of reemployment absent cause. While there was limited evidence in support of the proposition, it was suggested that institutions could have procedural susceptibility where they had permitted teachers to acquire vested financial interests in insurance or retirement benefits. However, whether teachers could support their claims to future fringe benefits exclusively on the fact that they had built up a financial equity--particularly if the institution made no attempt to deprive exiting faculty of any prior accumlated benefits--was not fully treated.

Especially in cases where there had been an absence of state involvement with the college or university, it had been observed that courts would avoid a constitutional test where redress could be provided through statutory or contractual remedies. As a precursor to exploring the constitutional vulnerability of private institutions, therefore, the potential character of their liability was investigated next from statutory and contractual vantages.

Professorial Challenges in the Private Sector

The institutional litigants in Roth and Sindermann were members of the public higher educational community. As such, they were agents of the state and thus comparably liable for their own constitutional violations. (74:540). In his concurring opinion in Sindermann, Burger emphasized that in both holdings the existence of the teachers' vested interests had turned on the nature of their express or implied contractual relationships with their institutions. The existence of such rights, he noted, entitled teachers to academic hearings because, according to the prevailing judicial view, fourteenth amendment procedures were assured to any public employees who had a protected interest which the government had placed in jeopardy. (45:603-4).

While these cases gave no cause for the Court to address the related question of private institutional accountability for the Constitution, Douglas made the following passing commentary in his dissent in Roth:

> No more direct assault on academic freedom can be imagined than for the school authorities to be allowed to discharge a teacher because of his or her philosophical, political, or ideological beliefs. The same may well be true of private schools, if through the device of financing or other umbilical cords they become instrumentalities of the State. (15:581).

The challenges in Roth and Sindermann became concerned more with the means by which liberty and property interests of teachers in higher education could be acquired than directly with whether it was the state which had abridged such interests. Aside from whatever protection could be interpreted from the Constitution of its own force, given the fact of state liability, a number of legislatures have attempted to define the rights of nonprobationary professors by enacting tenure statutes. (101:469). In the private sector, similar equities were only obtainable through contract; and at a substantial number of private junior colleges, term contracts replaced tenure systems. (93:598, 603). To whatever extent the Constitution may have been found to have applicability in the private sector, dismissal of a teacher in contravention of the institution's contract obligations has been legally established as the deprivation of a protected property interest. (60:588). Roth and Sindermann illuminated the theory of faculty rights being derived through interpersonal faculty and administrator relationships from within the institution. In this study, while there were otherwise few differences found to be due especially to their public or private character, institutional vulnerability was assessed through investigating both (1) the contractual associations between faculty and administrators in the private sector and (2) the type of private-state complicity which could subject private institutions to the constitutional proscriptions.

Due Process Alternatives Through Contract

Contractual obligations, O'Neil pointed out, have been determined by state laws and the relevant precedent has been established in state courts. (98:156). Menard agreed and observed that most state courts routinely interpreted them according to the intentions of the parties as expressed in the contract itself. (94:257). Matheson concurred with the influence of contract covenants and added that procedural claims at private institutions were also frequently founded on organizational by-laws or regulations. Unlike public entities which might be compelled to reinstate a teacher if they violated his statutory rights, private institutions would be subject only to the remedies in contract. (93:603). Matheson illustrated the importance of the distinction by pointing out that:

> . . . there has been little judicial support for a remedy for breach of contract beyond an action for damages. Specific performance of a personal service contract is generally denied because of the traditional equitable rule that the continuance of a close and undesirable personal relationship will not be compelled. This is so even though money damages may not be a legally adequate remedy where the college faculty member has had a career damaged by loss of employment. (93:603).

With respect to contracts of academic employment in general, Finkin's appraisal of the developing law was that terms and conditions of such agreements incorporated not only the teacher's notice of appointment but also included institutional policies and practices espoused in its pronouncements, regulations, and faculty handbooks. (76:345-46). Litka observed that policy statements by the college's governing body had the force of formal regulation and that their incorporation usually took place by letter or by a specific provision in the employment contract which made reference to them. (91:269). Menard found evidence where the judiciary had also incorporated faculty handbooks into the collectively bargained contracts at private universities. (94:257-58). Bakken concurred with these analyses insofar as the incorporation was confined to the policies and practices of the campus involved in a particular dispute. (62:207-8).

In 1969 in Greene v. Howard University (26), although the District of Columbia Circuit Court of Appeals gave recognition to "the generally unqualified nature of the university's power to determine whether nontenure teachers shall continue beyond their appointed terms" (26:1132), the Court's spokesman, McGowan, declared:

> Contracts are written, and are to be read, by reference to the norms of conduct and expectations founded upon them. This is especially true of contracts in and among a community of scholars, which is what a university is. The readings of the market place are not invariably apt in this non-commercial context. (26:1135).

The private Washington, D.C., university had failed to renew the contracts of several faculty members who, along with a group of students, had been involved in a disciplinary incident. Despite their nontenured status, the Court reversed a lower ruling and held that procedures which were provided for in the faculty handbook were contractually binding on the administrators irrespective of their prior inclusion of a written disclaimer of contractual intent. The Court observed that the university's regulations and practices had caused even nontenured faculty members to acquire the expectation of a hearing before nonrenewal. (26:1133-35).

The failure of the courts to impose any material distinction between the contractual obligations of public and private institutions, as well as evidence to the mutuality of public-private contributions to procedural theory, could be observed in cases which contributed to that theory. Ferguson was a forerunner of Roth and Sindermann and had formed the basis upon which the Court of Appeals relied when Sindermann was at that level. (51:943). Clark delivered the Fifth Circuit's opinion in both Ferguson and in Sindermann. (23:853, 51:940).

In Greene the Court held the private university procedurally accountable to nontenured teachers because it found that the institution's regulations and practices "elevated" the expectancy of timely notice to a "contractual status." (26:1134). The Ferguson Court cited Greene in support of its finding that the nontenured professor was entitled to a hearing, as Clark said:

> But a college can create an obligation as between itself and an instructor where none might otherwise exist under the legal standards for the interpretation of contract relationships regularly applied to transactions in the marketplace if it adopts regulations or standards of practice governing nontenured employees which create an expectation of reemployment. (23:856).

In 1970 when Sindermann was being appealed in the Fifth Circuit, the Court's spokesman, Clark, cited both Greene and Ferguson when he said:

> Before specifying what procedural devices ought to be available to Professor Sindermann at the collegiate level, a determination must be made as to whether the teacher involved has tenure or an expectancy of reemployment under the policies and practices of the institution. (51:943).

Two years later the Supreme Court confirmed that a university's contractual obligations to its faculty need not always be in writing. (45:602). Speaking in their behalf, Stewart said that they agreed with the Court of Appeals that because of "the policies and practices of the institution," the college officials were obligated to grant Sindermann "a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency." (45:603). Thus the objective "expectancy of reemployment" test which characterized Sindermann, which entitled the teacher to a pretermination hearing, and which was one of two "landmark rulings" had its roots in the private sector.

Where agreements between administrators and faculty had been arrived at through collective negotiations, Baird and McArthur found that the majority of them contained alternative procedural benefits in the form of grievance and arbitration provisions. (61:209-10). To some extent, as Jascourt observed, these clauses had been encouraged by teachers' unions because of organized labor's distrust for procedures which were already established through administrative channels. (85:557). Baird and McArthur noted, however, that the negotiated procedures have at times differed from those constitutionally mandated for some publicly employed teachers to the extent that in some courts they were unacceptable. (61:218-19). Nevertheless, they also observed that in the usual case, although the grievance procedures did not comport with due process in every respect, since they had been obtained through representative bargaining and complaints were resolved by outside impartial arbitrators, the courts were disinclined to entertain appeals. (61:221). In addition to whatever other motivation may have accounted for the judicial reluctance, Menard attributed it to a balancing process which, although involving private agreements, concerned an intervening public goal established in 1935. Through the National Labor Relations Act (121), he noted, Congress had set a national priority of peaceful labor relations. (94:261-62). Jascourt added that although grievance procedures may have lacked elements which would have been requisite under the usual constitutional or judicial standards, the courts of the 1970s were tending to not consider such deficiencies as a denial of constitutional due process:

> . . . since employee rights are waived by virtue of the exclusive representative voluntarily agreeing to a different procedure even if the employee did not approve of the collective bargaining agreement and since arbitration carries out a public policy. (84:199).

Menard referred to that judicial standard as the "principle of exclusivity" by which the courts also treated collective bargaining contracts in higher education as having superseded any individually negotiated agreements. As a further consequence, he noted, since nontenured faculty had no vested rights in tenure, their conditions of employment were always subject to change by the bargaining representative. Moreover, even if the professor had attained either formal or de facto tenure, according to his analysis, the exclusivity approach was tending to not only eliminate the concept of individual contracts at private institutions, it was shifting tenure policies from board initiative to the collective negotiations. (94:261-65).

Outside of the labor-management relations setting, the continually developing common law persisted in its recognition of established contract principles. From his analysis of noncollectively bargained contract cases which were decided from the beginning of the century to the mid-1970s, Matheson concluded that private institutions have continued to possess several defenses against their own contract vulnerability to procedural challenges. In addition to the judiciary's preferred remedy of money damages rather than compelling specific performance, he witnessed the failure of several administrator-faculty member agreements to meet the usual contract essentials of unconditional promises, mutuality, proper exercise of administrative discretion, and written terms where sometimes necessary for enforceability. (93:603-4). Finkin reiterated, however, that the courts would continue to be receptive to a faculty challenge where the administrative actions had defeated the reasonable expectations of the contract. (76:351).

Private institutions, then, could become obligated to grant pre-termination procedures to nontenured faculty where they either voluntarily assumed a commitment to do so or promulgated policies which justifiably led teachers to that expectation. The duty could arise through individual or collective negotiations, but in all cases contractual covenants were within the prior contemplation of the administration and required some overt conduct on their part. There were other instances, to which the inquiry was next directed, where similar duties might arise without administrative intent.

Constitutional Vulnerability in the Private Sector

In his study of the legal risks borne by higher educational entities, Aikan found that, except for proprietary institutions, no private university or college possessed a high degree of autonomy. (58:166). Furthermore, the differences between public and private educational institutions, according to Adams, have not been clearly defined and thus have been subject to increasing judicial scrutiny. (16:956).

O'Neil suggested that the characterization of some institutions as private was a legal fiction created by the courts. (98:157). Considering such factors as size, governance, diversity of programs, and character of the faculty and students, he perceived little functional distinction based on any public-private differences. (98:162-68). Cohen, too, suggested that institutional similarities and dissimilarities were founded on criteria other than their being either independent or state supported. He did not suggest that there were no differences among colleges and universities; but rather that among them, their private or public character was perhaps the least important. (68:644-45). Brubacher noted that while due process guarantees were not available to the same extent at private as they were at public colleges, "some of them present the same threat of bigness and impersonality that many public ones do." (66:271). Following his analysis of state regulation of private higher educational institutions, Hendrickson concluded: "The definition of private higher education in a national context appears impossible. The definition of private varies among the states on the basis of each state's involvement with the private sector." (81:74-75). Whether real or fictitious, however, Antoun noted that the Supreme Court's own perception of a bifurcation in the education community had caused it to resist any attempt at its disruption. (59:737-38). Because of the irresolute status of the distinction and because of some constitutional ambiguity, private administrative practices in contravention of guaranteed liberty and property interests have risked sanctions from the bar. (1:62).

If the issue involved wrongs committed against a teacher in connection with his involuntary separation from the college or university, Elkind noted, fourteenth amendment protections could not be invoked unless the action by the institution was held to be sufficiently state related. (72:656). Expounding on that point, Rood commented:

> An institution which can prove that its action is not "state action" is not bound by the fourteenth amendment and will generally not be required to answer charges that it failed to provide adequate notice, a statement of causes, an appropriate hearing, or that it violated some other aspect of due process. (105:131-32).

The values of pluralism, personal autonomy, and freedom in the use of one's property, according to Elkind, were contemplated by those who drafted the Constitution when they placed limits on government power.

He attributed the same values to the judiciary's unwillingness to hold private parties accountable for constitutional promises. (72:656). Similarly, Weiner observed, the Supreme Court has held that the fourteenth amendment provided no safeguards against purely private conduct. (48:1002).

The Dartmouth Influence on Private Autonomy

There has been a popular view that the primary design of public higher education was to supplement the private sector. (103:40). The origin of that position has been attributed to Marshall (98:157), who delivered the opinion of the Supreme Court in its 1819 Dartmouth v. Woodward decision. (56). The public-private question arose in that case when the state of New Hampshire attempted to seize control of Dartmouth College, asserting that because the source of that institution's authority and the nature of its activity were both state related, it was a state organization. (29:679). The Court denied the state's petition (56:712) and thus created the judicial distinction between private and public educational institutions. (108:1425). Marshall's opinion advanced the proposition that private colleges "do not fill the place, which would otherwise be occupied by government, but that which would otherwise remain vacant." (56:647).

Viewed as an imperfect reflection of the "realities of higher education," O'Neil described the distinction as "peculiarly American" and attributed to Marshall's stance an influence on contemporary judicial pronouncements which renders them constitutionally dubious. (98:156-57). Pacenza, however, reacting to a series of judicial encroachments on private autonomy, urged that a revitalization of the Dartmouth principles would more accurately reflect the role of private higher education. He attributed a "special value" to the detachment of private institutions from government. (100:67). Hendrickson recommended that the confused legal status of private higher education since Dartmouth be resolved by examining the case law involving their constitutional vulnerability and the special relationship of each state with its private postsecondary institutions. (81:53-54).

The inquiry at this point examined the inclination on the part of the courts to become involved in the internal affairs of private schools. That judicial propensity was found to be constrained by barriers which were both theoretical and philosophical. The theoretical resistance (possible because of the separation established in Dartmouth) derived from the courts' perceived absence of power to intervene in private affairs; namely, a lack of jurisdiction. (74:540-42). The philosophical impediment was nurtured from a traditional judicial reluctance to become so implicated--the judicial restraint philosophy. (supra 31-35).

Impediments to Judicial Intervention in the Private Sector

In view of the generally accepted inapplicability of fourteenth amendment proscriptions against conduct which was purely private (58:166), individuals who attempted constitutional action against independent schools usually confronted a jurisdictional barrier. (74:540-41). Traditionally, whenever courts felt they lacked jurisdiction over the subject matter of a case, they refused to hear it. To decide issues in which there was a lack of jurisdiction would have been to render their judgments unenforceable. (2:44-45). Courts have found jurisdiction over private activity where there was significant state involvement in the internal business of private institutions. (21). The mere existence, however, of participation by the state in private affairs has not by itself been sufficient to invoke the Constitution. (105:128). Faccenda and Ross stated:

> An individual alleging that a private educational institution has deprived him of his constitutional rights must show that the institution acted on behalf of the state--as an arm of the state, which if proven, subjects the private school to the jurisdiction of federal courts. (74:540).

The source of judicial authority over fourteenth amendment contests in the private sector has been extracted from the Constitution indirectly. Section Five of the fourteenth amendment invested Congress with the power to enforce the amendment's provisions by legislation. (125). If litigants sought relief from wrongs committed by the states or their agents, the courts reach was obtained from the amendment of its own force. (114:561). As a jurisdictional prerequisite (92:393) to asserting the same causes of action against private parties, however, grievants have had to plead a provision of the United States Code which was originally enacted by Congress as part of the Civil Rights Act of 1871. (119:11). Referred to as a "section 1983 action" (108:1403), the apposite portion of the Code provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. (117).

Thornberry explained that the "color of state law" requirement has had to be satisfied "in order to confer jurisdiction on the district court under 28 U.S.C. Section 1343 (3)." (44:1031). Referred to as the "jurisdictional statute" (98:159), Section 1343 conferred on the courts the power:

> . . . to redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, or any right, privilege, or immunity secured by the Constitution of the United States or by any act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States. (120).

The "color of state law" provision has been construed by the courts as reflecting the "state action" requirement of the fourteenth amendment (44:1031, note 6) and has been customarily employed in due process cases in the private sector. (59:737). State action, therefore, has been held as "the essential predicate for jurisdiction under Section 1983." (16:949). Likewise, when Section 1983's state action requirement could not be met and there was no independent basis for federal jurisdiction, fourteenth amendment challenges have been dismissed without consideration of their sufficiency. (20:822-23). Similarly, in all cases in both the public and private sectors of higher education, it was also necessary under Section 1983 for a challenger to prove the deprivation of a substantive right. The latter requirement was particularly burdensome for nontenured faculty members before the Roth decision. (101:470-71). Section 1983 did not, however, confine its source of remedies to the Constitution. Because of the "and laws" provision, other Congressional enactments have been asserted as the basis for federal jurisdiction over private causes of state action under the statute. (48:1008).

Federal power to regulate business having been provided in the Commerce Clause (126) of the Constitution, the National Labor Relations Board, in 1970, assumed jurisdiction over those private postsecondary institutions substantially affecting commerce. Declining to set forth a jurisdictional standard, it has taken its prerogative over campus disputes when it deemed the intrusion to be warranted on the basis of total dollar volume of the institution's transactions or other evidence of significant economic impact in the community. (74:554).

In 1972 Congressional enactment of 42 U.S.C. Section 2000e-1, known as the Equal Employment Opportunities Act (118), expanded federal civil rights jurisdiction over private universities. (86:938). The amendment removed educational institutions from exemption to a provision of the Civil Rights Act of 1964 which forbade sex discrimination in employment (48:1006), therefore, providing another means for incursion against the jurisdictional impediment. (74:551).

Notwithstanding the jurisdictional issue, courts have, as a product of their judicial restraint policy, avoided incursion into any internal affairs of higher education. In this respect there was little overt distinction made between public and private institutions; judicial interference with either was avoided. (68:644). Litigation that had been successfully taken against private postsecondary schools by their faculty was normally founded on such nonconstitutional grounds as actions in tort or in contract. (74:540). O'Neil felt there was some deference to private institutions, however (98:156), and Yackle has observed in the Burger Court a special respect for autonomy in the private sector, absent express Congressional pre-emption under Section Five's enforcement provision. The Court's own "sense of appropriate judicial restraint," he observed, has caused it to accede to legislative intrusion in private affairs although it would have otherwise abstained. (114:480-81). Similarly, Campbell expressed the Fifth Circuit Court's reluctance to use the state action test to impose constitutional obligations on nonpublic institutions if it "might incidentally contribute to the erosion of the autonomy and diversity of private colleges and universities." (12:1333). Contrasted with public institutions which have been compelled to mirror the consensus of their "relevant community," the Harvard Law Review noted, private policies have often reflected the particular idiological and philosophical persuasions of their founders, administrators, or faculties. The Review attributed the judiciary's usual circumspection in private pedagogy to their esteem for the social values of pluralism, diversity, and experimentation in higher education. (70:1055). They explained the public mechanism for fostering that ethic:

> The institutional autonomy of private schools in academic matters need not be the paramount social value. But the responsibility for deciding at what point other legitimate values override that interest has appropriately been confided to the community as a whole, speaking through its legislative body, and not to the courts. Recognition by the community of the fundamental importance of education, both to the individual student and to society generally, has led to the imposition of minimal quality controls on the private schools. (70:1055).

The jurisdictional impediment, then, could be circumvented only to the extent that the challenged conduct of a private actor could be regarded as state action. (59:725). Judicial restraint, while not peculiar to the independent sector of higher education, was energized in private institutions where state action was absent. Constitutional vulnerability was, therefore, apparently connected to the pervasiveness and strength of the state action doctrine. It was toward a perspective on that judicial tenet that further investigation proceeded.

The State Action Doctrine

Having established that private constitutional vulnerability was affected by the extent to which the challenged activity could be attributed to actions of the state, the question became: To what extent is a member engaged in sufficient "state action" for the teacher to invoke the due process clause of the fourteenth amendment?

The inquiry revealed that the state action doctrine was not conceived in faculty termination cases (81:53); and where the fourteenth amendment was involved, it was usually an equal protection issue. (83:919).

Societal preoccupations in different eras did have an apparent influence on due process questions in the private sector. State action was thus at issue in charges of Communist activities in the 1950s (13), student activism (81:58-62) and discrimination in housing (49) in the 1960s, and faculty retrenchment in the 1970s (75:516), suggesting that litigation should be viewed in a broader context than the specific fact situation of each case. Imposition of any constitutional obligation on private institutions and any judicial retreat from the traditional restraint philosophy could be regarded as an enlargement of the doctrine's applicability. A concomitant of doctrinal expansion would be an increase in private vulnerability. Since there had been at least limited evidence of judicial sensitivity to social trends, it was reasoned that the character of any intrusion into the affairs of higher education would be influenced by judicial response to the changing social environment. It was also presumed that attempts to forecast the private sector's susceptibility to further encroachments would depend in part on an understanding of judicial policy regarding the public character of higher education and the court's perceived importance of due process.

Diversity was found in both judicial and scholarly writing as to the parameters of the doctrine. A sample of opinions revealed references to state action as "a concept" (59:722), "a nonconcept" (64:91), an "illusive concept" (47:74), a "catch phrase" (64:88), a "legal fiction," a "misnomer" (98:168), a "fetish" (112:370), a "device" (114:481), and a "linchpin of federalism." (108:1401). In 1963 it was said to have reached its twilight (112:382), but in 1967 it was called the most important issue of the time. (64:69). The body of state action decisions was referred to as "murky waters" in 1974 (34:626) and "ubiquitous" in

1975. (100:58). As a constraint to judicial intervention, its demise was forecast in the Warren Court years; but its resurgence was witnessed with the Burger Court. (114:496, 505). By 1977 one court proclaimed it an "obdurate question." (16:955).

Civil Rights and Private Vincibility

Whether or not private institutions were compelled to provide constitutional protections has been declared to be dependent on whether or not they were bound by the state action doctrine. (105:127). The doctrine was derived from and was embedded in American Constitutional law because of the Supreme Court's interpretation of the fourteenth amendment (17:721) in the 1883 Civil Rights Cases. (19). The issue involved a challenge to the Civil Rights Act of 1875 (114:484) arising out of discriminatory practices against Negro plaintiffs by several private organizations. (112:348). The Court's decision, in support of the private right to discriminate, established the principle that the amendment's prohibitions were binding on state operations, not actions regarded as private. (82:208).

The state action doctrine emanated from that decision (114:484); and although it limited the courts' jurisdiction to acts performed by the states (50:842), private actions have, nevertheless, been barred by the amendments under two theories. One implicated the state where it had become directly involved in the private activity in question. The other resulted from the private institution's functions being held to be governmental in nature. (24:1276).

Government's complicity with the private sector was, therefore, found to have resulted from both official supportive involvement and state acquiesence to private assumption of government power. (72:658-59).

A threshold problem was in determining the extent of the government's obligation, if not its authority, to impose the fourteenth amendment's ethic into private activity. (64:98-99).

State Obligations under the Fourteenth Amendment

Part of the confusion in interpretations of the fourteenth amendment has been due to its own negative language (64:70), wherein the Congress provided:

> *No state* shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any state* deprive any person of life, liberty, or property, without due process of the law; nor deny to any person within its jurisdiction the equal protection of the laws. (125, emphasis added).

At the inception of the Court's state action doctrine, the position was taken that the amendment's prohibitions were limited not only to state as contrasted with private action but to a state's affirmative denials of the constitutional guarantees. (90:1083-84). This latter point could be distinguished from any state obligation to assure that there would be no private deprivation. Thus, if a court enforced a private party's right to exclude selected classes of citizens from his own home, the judicial enforcement would be state action. The state, however, would have been neutral on the merits of the discrimination and ostensibly free from constitutional wrongdoing. (114:487). This phenomenon was referred to by Black as the "'no state action' contention." (64:70). The 1883 decision originated that view and was expressed for the Court by Bradley who, in reference to the fourteenth amendment, declared:

> It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty, or property without due process of law. . . . (19:11).

Under this reasoning, according to Horowitz, the Civil Rights Act was held invalid against the defendants in these post Civil War cases because there had been no affirmative divestiture by the state. Not limiting the question to the private-state distinction, he asserted that for a successful challenge both the ingredients of unconstitutionality and state inflicted privation would have to be present. The federal statute could have been valid (prohibitive) only if there had been invalid state legislation; that is, legislative enactments compelling a denial of the constitutional protections. (82:210-12). Whether the Court's interpretation truly reflected the intent of those who drafted the amendment was in Williams' view debatable. Concurring that such literal interpretation by the Court had confined the amendment's restrictions against individual denials to official acts of the state, he insisted that the Civil Rights Cases had narrowed the scope of constitutional intent. (112:348-49). During the eve of the 1964 Civil Rights Act, in what Yackle described as the "sit in cases," the debate continued in the Supreme Court as to whether the fourteenth amendment limited its prohibitions against state violations to those which had been affirmatively committed by the states. (114:499-501). In 1968 the Second Circuit Court reinforced the immunity of private acts committed without any state compulsion. (47:81). Similarly, Saphire complained of a preoccupation with due process literalism in the Supreme Court of the late 1970s. He suggested that while such verbatim analysis preserved both the containment of judicial power and the majoritarianism in judicial review, it also rejected the framers' intent to uphold the values they sought to protect. (106:180-81).

Whatever limitations on the fourteenth amendment's application may have resulted from the creation of the state action doctrine, it could at least be concluded that direct affirmative denials by the state were unconstitutional. The question remained as to what other actions, if any, besides direct action by the state might also be prohibited by the amendment. (90:1084-85). Douglas, asserting that the Congress intended to address indirect forms of state involvement when it provided for Section 1983 claims, contended:

> Section 1983 was designed to give citizens a federal forum for civil rights complaints wherever, by direct or indirect action, a State acting "in cahoots" with a private group or through neglect or listless oversight, allows a private group to perpetrate an injury. The theory is that in those cozy situations, local politics and the pressure of economic overlords on subservient state agencies makes recovery in state courts unlikely. (33:363-64).

Private Associations as Instrumentalities of the State

Public educational institutions have been held to be agencies of the state and thus subject to fourteenth amendment prohibitions. (74:540). Sometimes, as the result of state involvement in their activities, private organizations have been similarly constrained; but especially in cases not involving racial discrimination, more often they have not. (72:656-58). In what he referred to as the "thirteenth amendment decisions," Yackle explained that the elimination of racial discrimination has had a high national priority since the Reconstruction period. He noted that the thirteenth amendment prohibited not only slavery but also the relics of slavery and contains no "state action" limitation. While observing that there are limits on Congressional power to eradicate racial discrimination, he asserted that its enforcement power in that area is broad under the thirteenth as well as its companion fourteenth amendment. (114:550-60).

The racial question notwithstanding, in those instances where the fourteenth amendment was deemed applicable to private conduct, the rationale advanced was that under certain circumstances if there was sufficient state implication in the activity, such acts might be regarded as acts of a government or "public agency." (58:162). For constitutional purposes, if the degree of state participation was dominant, the private interest in autonomy could be overlooked. Where there was limited state involvement in the private action, however, the question could be raised as to whether the extent and nature of state implication were sufficient to reach the amendment. (90:1089).

As with the origin of "state action," the "state agency" doctrine's foretoken was in the Civil Rights Cases. (112:349). The basis for the conception was revealed in a dissent by Harlan whose focus was directed on Section One of the fourteenth amendment which guaranteed protections to all citizens, not on the limits perceived by the majority's public-private dichotomy. Williams noted that Harlan's thesis was predicated on Congress's power under Section Five of the amendment to enforce its provisions through legislation. (112:349-51).

With respect to the public-duties character of the functions performed by some private litigants, Harlan wrote:

> In every material sense applicable to the practical enforcement of the Fourteenth Amendment, railroad corporations, keepers of inns, and managers of places of public amusement are agents or instrumentalities of the state because they are charged with duties to the public. (19:58-59).

The ease with which Harlan's agency proposition could be applied to private activity has been, according to Elkind, dependent on such factors as whether the private activity was motivated by the government, whether the impetus occurred at the initial stages of the exercise, and what public interest was being furthered by the administrative prodding. According to his analysis, whenever the government enlisted private assistance in carrying out its own objectives, it was precluded by the courts from circumventing its constitutional responsibility by employing private parties as instrumentalities. Citing United States v. Davis (57), he did not see the presence of a private self-interest in the prohibited conduct as a controlling factor. (72:680-81).

In Davis the Ninth Circuit Court found state action on the part of a private airline which had implemented government-imposed anti-hijacking procedures in order to screen passengers. The conduct was held to be in violation of the fourth amendment's proscription against unreasonable searches and seizures. (57:893).

Elkind advanced the view, however, that an agency connection was less compelling where the private activity had been engaged in prior to any government sponsorship. In other words, where the government had not incited the conduct and its role was not dominant, the pre-existing private character of the function was more likely to be preserved. Similarly, if the issue under challenge was incidental to the government's reason for exerting its influence, the doctrine's viability would be suspect. Unless, for example, the specific purpose for the government ascendancy had been the creation or expansion of employment, the private institution's internal hiring and firing policies would not be subject to the due process clause. (72:680-85). Hendrickson agreed that even if the state action doctrine were applied to private educational institutions, case precedent suggests that because of the usual purpose for involvement by the government, constitutional due process guarantees would not apply to faculty employment rights. (81:65).

Government Influence over Private Postsecondary Policies

In the interest of furthering socially approved objectives (73:5), such as equality of opportunity, since 1960 the federal government has significantly increased the volume of regulation over all institutions of higher education including those in the private sector. (74:548). It has been able to impose compliance through its enforcement prerogative under the fourteenth amendment, the commerce clause, Internal Revenue tax exemption regulations, and to a limited extent, through Executive Orders where the school has accepted government research contracts. (96:1-5). In those instances where the Congress has failed to legislate, the states, acting under their police power to protect public health, safety, and morals, have retained the right to regulate private activity, uninhibited by a lack of authority under the U.S. Constitution. (114:526). The original Bill of Rights, however, limited the power of the federal government to restrict private conduct, and the fourteenth amendment extended that proscription to the states. (112:351). Concomitantly, the provisions through which the Constitution has been made an instrument of encroachment against educational autonomy may also have provided a means for protecting the same collegiate independence. (96:10-12). Describing some of the Civil Rights requirements as "patently illegal" (96:6), Oaks asserted that the first amendment rights of private institutions entitled them to due process guarantees against state regulation. (96:11). Although he reported that there had been some limited support for this position in the 1920s, Dolan found the courts reluctant to raise the issue in later years. (71:663-64). The extent of both federal and state regulation over private postsecondary institutions was cited as a factor contributing to the perceptual difficulty in distinguishing them from those in the public colleges and universities. (98:180-81).

Despite the surface appeal of some arguments which urge state action on the basis of government regulation, Hendrickson's appraisal of cases which involved regulation caused him to express doubt that such findings would result. (81:68). Agreeing with that analysis, Antoun added that to analogize regulation with state action would be to defeat the "constitutionally imposed" distinction between public and private institutions. (59:730-31). Although Elkind found the private-public emasculation contention a theoretically weak argument (72:689), he confirmed the futility of promoting regulation as grounds for state action by noting that whereas regulation is a limitation on private activity, state action has been a convincing assertion only when the government had supported the challenged private acts. (72:659-60, 689-90). The Seventh Circuit Court of Appeals, in 1975, supported Elkind's contention in Cohen v. Illinois Institute of Technology (20) when they pointed out that:

> It is settled . . . that the mere existence of detailed regulation of a private entity does not make every act, or even every regulated act . . . the action of the State. Unless it is alleged that the regulatory agency has encouraged the practice in question, or at least given its affirmative approval to the practice, the fact that a business or an institution is subject to regulation is not of decisive importance. (20:826).

While the courts have declined to furnish definitive standards regarding which aspects of private conduct may constitute state action (17:722), judicial authority has provided both foundational concepts and functional guidelines (98:168-69) by which predictive criteria may rise above the level of pure speculation. (112:390). Acknowledging that each institution would have to measure its own fact situation against case precedent, Faccenda and Ross observed:

> Generally, the actions of a private institution are held to be state actions when the private institution is an integral part of the public purpose or when the state is deemed to "so insinuated itself into a position of interdependence" with the private institution that it must be recognized as a joint participant in the challenged activity. (74:544).

Some criteria which, standing alone, have been rejected as a basis for finding state action in private higher education were power of condemnation over private property adjacent to the university (24:1278), tax-exemption, government support of research projects, scholarships and loans, contacts with the city, construction, leasing, and financing of buildings (48:1004, note 16), and issuance of a state charter. (27:559). Rood noted that the residual criterion most persuasive for a finding of sufficient state involvement was that of government control over institutional policies. (105:128-29). Ellis elaborated:

> The law is clear that purely private organizations performing purely private activities may freely associate themselves with a State in such a way as to make the private organization in its private activity, subject to the Fourteenth Amendment, whether that activity be that of a restaurant, . . . a golf course, . . . a library, . . . or in this case a university. With few isolated exceptions, . . . activities are in themselves neither public nor private. What gives them their constitutional character is their source of power and control. (29:682-83, citations omitted).

Concurring in the viability of government as the source of power, one study reported, however, the judiciary's use of an "indicia" test for state agency in which the aggregation of otherwise uninfluential factors have collectively constituted sufficient government implication for a finding of state action. (70:1057-59). The Duke Law Journal described the indicia approach as one which "most arouses the optimism of those who advocate an expansion of the state action doctrine to the disciplinary proceedings of a private university." (99:800). A combination noted by one investigator for a possible finding of agency through accumulation included the simultaneous presence of both state and federal financial aid and the provision for private instructional offerings in a state's master plan for higher education. (81:61). For a holding of state action due to joint involvement by the institution and the state, the courts have had to be convinced that the level of state participation was "significant" (17:722), a word considered by Black as "the key term of art." (64:84). Legally sufficient state funding, for example, called for a quantitative measure; that is, "a good deal more" (28:548) than mere existence of state support had to be shown. Similarly, a factor such as a grant of tax benefit was not (74:545), absent the unlikely discovery that it was contingent on the fulfillment of some express public purpose (29:684-85), very influential. Certain other indicia, however, such as conferring a power obtainable only through government or state dominance of a private "instrumentality" could, standing alone, warrant a state action holding. (72:660). Alternatively, as with the structure of due process, where a question of public policy was involved, the courts have sometimes balanced the social value of constitutional protection against the frequently conflicting importance of preserving certain competing private interests. (59:722).

Trappings of Private-State Conjointment

A problem which has confronted the lower courts in their attempts to heed the commands of the Nation's highest tribunal was expressed for the Third Circuit by Adams in 1977, who complained:

> On several occasions, the Supreme Court has endeavored to decide when the participation of a state in an otherwise private activity is so significant that the acts of the seemingly private enterprise are to be considered state action. While the leading cases may serve as guidelines for our inquiry here, no attempt has been made by the Supreme Court, as of yet, to reconcile what may appear to be conflicting pronouncements on state action. Nor has the Court thus far sought to delineate a unitary theory of state action. (16:956).

Some insight into the tenuous nature of the indicia approach to state agency was revealed in opinions, dicta, and scholarly analyses of five related cases; the first four of which reached the Supreme Court.

In 1961 Burton v. Wilmington Parking Authority (17) created the "combination of factors" test of state agency as a form of state action in a successful fourteenth amendment challenge under the equal protection clause. (108:1402). The Court implicated the state of Delaware when a private restaurant, the Eagle Coffee Shoppe, which had been leased from and financially aided by the city of Wilmington's parking authority and was located in the building of one of the Authority's public parking facilities, withheld services requested by one of the facility's black patrons. (17:859-62). Clark, in delivering the majority's opinion, declared that:

> By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination. The State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so "purely private" as to fall without the scope of the Fourteenth Amendment. (17:862, emphasis added).

Seven years later in Moose Lodge No. 107 v. Irvis (43), a private club refused to serve the black guest of one of its members. The Court, reaching its decision in 1972, did not, however, find Pennsylvania's granting of a liquor license to the lodge or its comprehensive scheme of regulation over licensees to be sufficient state involvement for the doctrine to apply. (43:1973). In Burton the wrongful private conduct had promoted the financial interests of the state, whereas in Moose Lodge the Court found neither a state purpose nor any use of state facilities in the challenged private discrimination. It noted further that since the state had not become a joint venturer with the private actor, private autonomy would continue to be recognized. (43:1973). The Moose Lodge opinion also declared that, per se, the receiving of a benefit or service from the state and being subject to state regulation would not attach constitutional responsibility. (43:1971). The latter decision effectively lessened the persuasiveness of asserting state action when it was predicated solely on a state's granting of benefits to private endeavors. (114:508).

The Supreme Court's apparent departure, in Moose Lodge, from the indicia guidelines was confirmed thirteen years after Burton in Jackson v. Metropolitan Edison (33). Rather than applying Burton's combination approach as the determinative test for state action, Jackson articulated the Moose Lodge holding, insisting that a specific nexus would have to be shown between (a) the action being challenged and (b) the nature of the state's involvement. (33:351). In Jackson the customer of a private utility in Pennsylvania had unsuccessfully raised a fourteenth amendment claim against the corporation's unilateral termination of services to her without a due process hearing. (33:348-49, 359). Dissenting from that departure by the Jackson majority, Douglas argued: "It is the aggregate that is controlling," and asserted that Burton had made it clear that the dispositive question was not whether any single fact constituted sufficient state involvement, but whether the "aggregate of all relevant factors compels a finding of state responsibility." (33:360). Although he felt the circumstances of the case may have been too complex for a proper disposition of the issue on its merits (33:365-66), Marshall also dissented from the no state action holding because, in his opinion:

> Our state-action cases have repeatedly relied on several factors clearly presented by this case: a state-sanctioned monopoly; an extensive pattern of cooperation between the "private" entity and the State; and a service uniquely public in nature. Today the Court takes a major step in repudiating this line of authority and adopts a stance that is bound to lead to mischief when applied to problems beyond the narrow sphere of due process objections to utility terminations. (33:366).

The nexus-aggregate argument, originated by Burton and nurtured by Moose Lodge and Jackson, precipated a controversy regarding the autonomy of private higher education which has not been addressed by the Supreme Court. (16:956).

State-Private University Conjointment

Five months after Burton was decided (29:674), the indicia approach became private postsecondary education's entry into the state action debate (81:58) in Guillory v. Tulane University (29). A group of Negro students who were otherwise qualified (29:676, note 2) had been denied admission to the private Louisiana university because of its policy of accepting only white applicants. (29:676). The university administrators defeated the students' fourteenth amendment challenge fifteen months later by asserting constitutional inapplicability of their conduct, citing Bradley's state action requirement conceived in the Civil Rights Cases. (29:676). Ellis, the district court's spokesman, predicated his denial of state action by the university trustees on the essential dochotomy established in Dartmouth (29:679) wherein Marshall had considered such factors as the source of institutional authority and the derivation and application of funds in his rejection of state dominance over private higher education. (56:635-36). In Guillory, Ellis aggregated and singularly rejected limited state participation in university policy making, state funding, tax-exempt status, the state's grant of property with a reversionary clause, and statutory complicity with the state university system as not sufficiently significant involvement with the state for a finding of state action. (29:683-87).

The joint involvement which had been missing in Guillory was present in the 1968 case of Powe v. Miles (47), but the same chastisement rendered by the administrators of a private New York university was considered public when applied to one group of students and private when applied to others. (72:674-75). In this instance the Second Circuit Court found sufficient state indicia in a university-state association to entitle only three out of a group of seven students of the same campus to be shielded by the fourteenth amendment. (47:83-84). No such protection was afforded the remaining four students even though all seven had been involved equally in the same disciplinary incident. As part of a state-wide plan for both secondary and postsecondary education, the state of New York had engaged several private institutions to furnish higher education. Under this arrangement, governance of the state-designated activities of the private institutions (known as statutory or contract colleges) was coordinated with that of the state operated institutions. (47:75). In the instant case, the Court upheld the state's own statutory designation of the private university administrators as representatives of the state university trustees with respect to the students enrolled in the campus's contract college. (47:83). With respect to the others enrolled in one of the private colleges of the university, however, the Court found that the same administrative acts were not those of a state agent. (47:81).

In a 1974 faculty sex discrimination case against the University of Pennsylvania, the district court refused to read either Moose Lodge or Jackson as requiring a direct nexus. (48:1003). In a decision which was never overruled (119:50), Rackin v. University of Pennsylvania (48) found state action on the part of the private university by combining factors which, it noted, were singularly nonimplicating. (48:996-1005).

In apparent agreement with the Rackin Court as well as Douglas's dissent in Jackson (33:360), the Third Circuit Court of Appeals, in the 1977 Braden v. University of Pittsburgh case (16), affirmed the judgment of a district court which had employed the "overall relationship" analysis in denying a dismissal motion. The university's motion had contended a lack of state action in the Pennsylvania institution's failure to renew a female teacher's contract, allegedly motivated by sex discrimination. (108:1405-6, 1423-24). The Appellate Court did not sustain the lower court's finding of state action as such but only supported its refusal to summarily rule "that the activities of the educational institution occur outside the ambit of state action." (16:955-56).

In an opinion that concurred with the Third Circuit majority's decision, but not with their reasoning (16:970), Garth, wishing to prevent any misunderstanding of the Court's holding, cautioned:

> First, I think the Court has greatly oversimplified the evolution of the Burton theory of state action by flatly equating Burton with the "overall relationship" test. . . . the Burton Court stated specifically and at some length that it was not announcing a state action "test" of general applicability . . .
>
> . . . I believe that a brief examination of . . . [subsequent] cases reveals that the question which Burton left open--whether the "overall relationship" test or the "nexus" test is the correct one--has now been answered in favor of the nexus standard. (16:971-72).

However, the majority's edict was, according to comments by the New York University Law Review (108:1417), inconsistent with Garth's notion to accept one and reject the other test of sufficient state involvement. Articulating the Appellate Court majority's opinion, Adams had inferred that successful aggregation of the state contacts was a prerequisite to the weighing of an appropriate nexus. (16:964-65). He had rationalized his analysis as being not inconsistent with Cohen (20), a factually similar case in which the Seventh Circuit in 1975 had failed to find state action, by observing that Cohen considered the nexus question only after a cumulative contacts scrutiny had failed the test. (16:965). The NYULR, however, dismissed Adams' reasoning because the Jackson case, upon which Braden was partly founded, made no attempt--in fact, rejected--the cumulative connections approach. On the contrary, the NYULR observed, the Supreme Court in Jackson, while expressly preserving the soundness of Burton, nevertheless failed to decree state action simply because there was no appropriate nexus. (33:358-59). Moreover, failing to find a pertinent connection, Jackson did not attempt to combine any effects of other indicia. (108:1417).

The NYULR reconciled the apparently conflicting pronouncements of Burton and Jackson and postulated them into a test for state action in private higher education which was predicated on the teachings of both precedents:

> . . .both cases employed a single test with two conjunctive elements. The first element, a qualitative analysis of whether a nexus exists between the state actor and the challenged activity, is a necessary but not a sufficient condition for a finding of state action. The second element, which comes into play only if such nexus is found, is an inquiry into whether there exists a sufficient quantum of involvement between the state and the private actors to warrant the imposition of constitutional constraints. (108:1417-18).

Garth, however, was willing to concede that either theory could by itself support a state action finding. (16:973-74). His reading of the evolution of the Burton-Jackson analysis was that the Supreme Court had simply imposed a heavier burden on the aggregate approach than had its previous "significant involvement" requirement. Reiterating the Jackson revision, he recapitulated:

> In sum, I interpret the Supreme Court's and this Circuit's recent state action decisions to require either (a) state involvement with a private entity which is "so dominant as to afford basis for a contention that the state is merely utilizing a private trustee to administer a state activity" and therefore has necessarily participated in the challenged activity, or (b) proof

that the state has affirmatively supported or is directly involved in the specific conduct challenged. (16:974).

The authors of the NYULR analysis read Garth's comment about state involvement to the point of dominance as a nexus equivalent. (108:1412). They attached little or no importance to which of the specific substantive constitutional questions were raised in support of a state action challenge. (108:1416). On the other hand, they also pointed out that for want of a pertinent nexus, under the Jackson holding, their qualitative-quantitative test could not be expected to sustain a terminated employee who rested his or her challenge on the private employer's denial of procedural due process. (108:1420). Jackson evidenced a judicial return to finding state action only when the private actor had been used as an instrumentality for direct state wrongdoing. (114:520-21).

It could be concluded, then, that the "state agency" test for a finding of state action was not confined to public agencies. Private establishments could be held constitutionally accountable for acts affected with a significant state involvement. "Legally sufficient" indicia of state influence, however, in order to satisfy the Supreme Court seemed to move toward a qualitative rather than a quantitative appraisal of the state's conduct as a threshold question. (114:521).

One of the remaining state action issues was the susceptibility of certain private activities which had a government countenance. In some instances the activity itself could be so inherently governmental that it was deemed a "public function." (90:1089-94). In others state action educed from a state's "judicial" involvement through either enforcing private agreements which would have been unconstitutional if performed by the state (112:364-65) or through failing to provide redress for private conduct against grievants when it would likewise have been contrary to the Constitution if state implemented. (82:215). Another question of state action arose even where private organizations were independent of any attempt by government to further its own objectives--beyond fostering their corporate purposes--through control of their internal policy. State implication in these latter cases resulted from their being socially perceived as an agent of the government, owing in part to their public franchise or to their statutory authority. (72:669-72).

The central question addressed by this part of the investigation was: To what extent will constitutional vulnerability result from state action in the absence of a state's voluntary conjointment with private entities?

Private Activities with a Public Character

The converse of a state's pursuing its objectives through its exploitation of the private sector has occurred when, in an attempt to encroach on areas of state exclusivity, private parties have sought to accomplish results which, if successful, would be contrary to constitutional intent. (90:1090-91). Some endeavored to extort their power through state acquiescence (112:363-64) while others have allegedly done so through engaging in acts which, though seemingly authorized, were not within the contemplation of their state charters or authorizing statutes.

Private activities infringing on a public function have involved such fundamental questions as the first amendment right of free speech (40), freedom in the disposition of one's own property (50), and the fifteenth amendment's proscription against discrimination in voting. (55). The seminal first amendment test of state action due to public function occurred in Marsh v. Alabama. (40). Contributions to public function theory also resulted from a series of legal disputes, some known as the "restrictive covenant cases" (90:1108) and others as the "white primary cases." (108:1413). From the decisions growing out of that litigation emerged the constitutional principle that if private parties assumed activities traditionally perceived by the judiciary to be functions uniquely public, they could be held answerable to constitutional commands. (72:691).

The Public Function Doctrine

Acting under the authority of state criminal trespass statutes in Marsh v. Alabama (40), the managers of a privately owned company town had forbidden a member of the Jehovah's Witnesses from distributing religious literature along the company-owned sidewalks. Appeal was made from an Alabama appellate court, which upheld the managers' conduct, to the U.S. Supreme Court after the state's highest tribunal had refused to hear the case. (40:501-3). In its 1946 finding of state action, the Supreme Court, speaking through Black, held that a company town was sufficiently involved with a "state function" that it could not "govern a community of citizens so as to restrict their fundamental liberties." (40:509).

Most of the state action contests predicated on Marsh's public function rationale were also confined to issues involving the denial of the right of free speech. (107:328-29). One such case, Amalgamated Food Employees' Local 590 v. Logan Valley Plaza (9), decided in 1968, concerned the public function character of large suburban shopping centers. The Supreme Court's majority, over the objections of Black (9:319-25), who had written the Court's opinion in Marsh (40:502), held that the shopping center was the "functional equivalent" of the company town's business block and thus linked to the Constitution. (9:319-25). The Court, however, did not give the company town and the large shopping center identical treatment. In Logan Valley union picketers had been asserting their purported first amendment rights against a specific store located in the center of the shopping complex. (9:310-11). The first amendment holding was expressly limited to situations where picketing was related to the purpose to which the defendant store was being put and where there were no reasonable alternative picketing sites. (36:2226).

The New York University Law Review contended that the state function doctrine's capacity for maintaining private shopping centers in the state action discourse was devitalized by two Supreme Court decisions handed down four and six years respectively after Logan Valley. (108:1413). Lloyd Corporation v. Tanner (36) and Hudgens v. NLRB (32), as with Logan Valley, both involved access to the commonways of large shopping centers for assertion of claimed rights to free speech in a state action context and were based on the public function criteria of Marsh. (9:309-11, 32:1031-35). The Lloyd decision had attempted to preserve Logan Valley's construction of Marsh by concentrating on the narrow fact situation to which the latter had been held applicable. (36:2226). But in 1976 Powell, who had authored the Lloyd opinion (36:2221), wrote, in comments that concurred with the Hudgen majority:

> The law in this area . . . has been less clear since Logan Valley analogized a shopping center to the "company town" in Marsh v. Alabama. Mr. Justice Black, the author of the Court's opinion in Marsh, thought the decisions were irreconcilable. I now agree with Mr. Justice Black that the opinions in these cases cannot be harmonized in a principled way. Upon more mature thought, I have concluded that we would have been wiser in Lloyd Corp. to have confronted this disharmony rather than draw distinctions based upon rather attentuated factual differences. (32:1038-39).

Since these decisions have left the effectiveness of the doctrine of public function in doubt (108:1413), however, Kratovil and Werner reported in 1979 that the state courts, which they contended have handed down the most important decisions on the subject, have remained free to follow the Logan Valley rule. (7:452).

In the "restrictive covenant cases" the ability of black citizens to obtain land in St. Louis and other cities had been foreclosed by the prevailing practice, among Caucasians, of including a clause in their documents of real property transfer which forbade grantees (buyers) from reselling their land to Negroes and, in some cases, to Orientals. (114:490-91). For purposes of maintaining standards in the use of land within a particular neighborhood, restrictive covenants of various types have been common devices in American real property laws, particularly in connection with housing developments. (2:204-5). Regarding the question of whether restrictions in the sale of land should be treated as a public or private function, Kratovil and Werner noted:

> Private land use controls rest on the philosophy that where private ownership of land is recognized, as it is in America, ownership of land includes the right to sell it on such terms as please the landowner, including the right to restrict the future use of the land in some way that seems desirable to the seller.
>
> There is a parallel, but quite different philosophy, namely, that use of land must be controlled, not in the interest of private individuals as such, but in the public interest. Both methods co-exist under our American law with some overlapping and some conflict. (7:285).

In 1948 in Shelley v. Kraemer (50), the Supreme Court decreed, however, that the use of restrictive agreements to preempt the rights of selected classes of citizens could not be judicially supported since to do so would be a fourteenth amendment violation under state action theory. (50:843). The private right to discriminate in one's own use of his or her property was not the issue; rather, it was the enforcement of these collective agreements by the judicial branch of the state that was held to be unconstitutional state action. (114:489-91). In effect, to have upheld the enforceability of the private clauses would have been to condone a cumulative result which would have been unconstitutional if effected by the same individuals acting in concert as a political unit. (90:1115).

A Georgia senator had willed land to the city of Macon that was to be used as a park for the exclusive benefit of Caucasians. Violation of that condition would cause the property to revert to the senator's heirs. In an attempt to avoid a finding of state action, the city sought to transfer its trusteeship to private individuals. (119:17). In 1966 the Supreme Court held, however, in Evans v. Newton (22), that services of a park--even one that was private--were traditionally a public function and the discrimination would be state action. (22:489-90).

A later case, Reitman v. Mulkey (49), challenged a 1967 amendment to the state of California's constitution which expressly conferred the absolute freedom of property owners and landlords to refuse to deal with any person and for any reason. (72:666). Within three years, both the highest court of that state and of the United States found the provision unconstitutional under the fourteenth amendment. (64:72-73). The California court had acknowledged the State's freedom from any obligation to forbid private discrimination among races and also its prerogative to remain neutral on such questions. (49:1631). Neither of the high courts, however, regarded the intent in drafting the amendment as neutral. (49:1631-34). In reporting the courts' reasoning, Black explained:

> California has not "merely" failed to throw the life-preserver: California has put the life preserver out of convenient reach, so as not to be tempted to throw it, and has passed the word down the line to those she commands, that the life preserver is not to be thrown. To revive an ancient saying, there is no question whom such actions are neutral against. (64:83).

While the State's constitutional amendment had not explicitly sanctioned any particular conduct, the California Supreme Court, through factual and contextual analysis, concluded that the purpose and effect were to encourage discrimination. (49:1630-32). One of the results, for example, would have been to nullify a prior legislative proscription against restrictive covenants. (49:1630).

The activities in challenge in the "white primary cases" had been undertaken by private political organizations in Texas. Various schemes were devised by the Democratic party in that state to disfranchise black voters. (112:359-60). Since the issues involved discrimination against Negro suffrage, they were measured against fifteenth amendment standards which prohibited the state from such partisanship on the basis of color. (90:1090-91). The fourteenth amendment's strictures were more generally stated. As with the fourteenth, however, the fifteenth amendment confined its prohibitions to state--not private--action. In Terry v. Adams (55) the Supreme Court, in 1953, held that the Constitution was applicable to this private activity because the supervision of voting for public officials was deemed a state function. (114:488).

The company town, the land grantors, and the political party, although private groups or organizations attempting to fulfill their own rather than government's objectives and independent of state persuasion, had, nevertheless, been made constitutionally responsible because they were involved with a traditionally governmental function.

Higher education as a function of the government was the object of inquiry by Marshall in the 1819 Dartmouth decision when the state of New Hampshire asserted that the college was public because it was dedicated to education. (29:679). Marshall pondered:

> Are the trustees and professors public officers, invested with any portion of political power, partaking in any degree in the administration of civil government, and performing duties which flow from the sovereign authority?
>
> That education is an object of national concern, and a proper subject of legislation, all admit. That there may be an institution founded by government, and placed entirely under its immediate control, the officers of which would be public officers, amenable exclusively to government, none will deny. But is Dartmouth College such an institution? Is education altogether in the hands of government? Does every teacher of youth become a public officer, and do donations for the purpose of education necessarily become public property, so far that the will of the legislature, not the will of the donor, becomes the law of the donation? These questions are of serious moment to society, and deserve to be well considered. (56:634).

The proposition for attaching general constitutional responsibility to private institutions invested with a public interest was rooted in Harlan's dissent in the 1883 Civil Rights Cases to the literal fourteenth amendment interpretations when the state action barrier was conceived. (19:58-59). The development of Black's 1946 public function concept in Marsh, as an incursion against that barrier, invited some political figures, some writers, and some litigants to urge "public function" as a medium for imposing constitutional accountability in private postsecondary education. The public function approach was not exclusively a state action issue. In the Slochower case of the Cold War era (54:248), the U.S. Senate was investigating "subversive influences in the American educational system." (52:553). The Court noted that the chairman of the Committee on the Judiciary qualifiedly limited his inquiry to national security issues because of his contention that education was primarily a state and local function. (52:553). In any event, although attempts to apply Harlan's public-interest attribute to independent universities and colleges has received some judicial recognition (29:675) and some scholarly advocacy (98:161-79), arguments supporting higher education as a public function have generally failed. (100:64).

Higher Education as a Public Function

Urging a broader application for private postsecondary institutions, Schubert was willing to concede that the first amendment limitations on the rights obtained in the application of public function might have been appropriate for the shopping centers. (107:330-34). He made the concession:

> . . . not because the doctrine of public function applies only to the first amendment but because private organizations should be subject to constitutional guarantees only when they have power to infringe such guarantees in a manner analogous to that of the state. Clearly the town in Marsh and the large private university, unlike the shopping center, have real power to infringe a wide range of constitutional rights in addition to those protected by the first amendment. (107:330).

O'Neil, too, contended that some large private universities possess enough of the same characteristics to be as constitutionally accountable as the company town. Applying the "community of citizens" logic of Marsh (40:509), he cited Stanford as one of several examples of university involvement in the lives of its whole community, including faculty. (98:187-88). Although the circumstances of the case were not identical to O'Neil's point, Faccenda and Ross observed that in California a federal district court in Furumoto v. Lyman (24) declared that the broad range of prerogatives exerted by Stanford University was simply the legitimate exercise of its corporate powers. (74:546). Because the "community of citizens" argument was not addressed directly by the plaintiffs or by the court, that case could not necessarily be regarded as an outright contradiction by the bench of O'Neil's proposition.

In Guillory the Court had asserted that the University was not a "thing," proclaiming that in the legal sense, it was an activity. (29:682). The dominant character of private university and college activities, by O'Neil's argument, was sufficiently embellished with a public function to warrant judicial review. (98:176-88). Acknowledging the tenuousness of faculty termination policies as a constitutional issue, he was lured into promoting their inclusion with the public function rationale when he reasoned:

> When a university employs janitors or kitchen workers, or even faculty secretaries, it is not exercising the power or the function that makes it a uniquely public institution. When it hires or fires faculty, certain kinds of research personnel and possibly library staff, however, the public character of the institution is directly implicated. Thus academic employment policies should rank rather high on the list of matters open to judicial review; nonacademic employment, by contrast, should be regarded in a college or university essentially as it would be treated in a large business firm, private hospital, or foundation. (98:189).

A Harvard Law Review summary of legal developments acknowledged that several types of repressive conduct by administrators of private schools had been judicially condoned although similar repression in the public sector would have been constitutionally unacceptable. The reason, the summary advanced, was because some types of suppression could be viewed as consistent with the unique character of the private institution. (70:1063-64). Concurring that private uniqueness contributed to an educational diversity which the judiciary had already decreed to be in the public good, the study proposed a "legitimate purpose" test (70:1063) for those who urged government intrusion, stating:

> Difficult cases might arise where schools impose restrictions of no discernable value. In such situations, the importance of encouraging diversity should operate to create a presumption in favor of the private school's decision, rebuttable only upon a showing that the restriction creates a positive harm outweighing the advantages to be derived from preserving a broad area of conduct free from judicial control. (70:1064).

Lewis viewed the public function guidelines less as evidence of doctrinal expansion than as a means for demarcating state action; and he placed the argument outside of the private college and university setting.

He reasoned that the public function rationale could not apply to education since schooling was not peculiarly a function of the sovereignty. He conceded, however, that this barrier could be invaded in part through acknowledging government's historical acceptance of the obligation to provide mass education. (90:1098). The Supreme Court gave credence to Lewis's principal argument in the reasoning which they provided with the Evans decision of 1966. (100:61). They noted that rather than leaving a park, if the testator had left a school for the exclusive benefit of one race and did not implicate the state, the action would probably have incurred no legal obstacles. (22:301-2). Subsequent decisions flowing from the Evans thinking tended to exclude private schools from the public function debate. (72:694, note 244). Grossner v. Trustees of Columbia University (28), a decision reached two years later regarding a student disciplinary incident, has been identified as the case which rejected the education-as-a-public-function argument. (105:128). In an opinion which cited Marsh, Logan Valley, and Terry, a district court located in New York declared, through Frankel:

> Plaintiffs' remaining thought--that Columbia performs a "public function" in "educating persons" which may be "likened to a 'company town' or a party primary system"--is, briefly, without any basis. It is not sounder for Columbia than it would be for Notre Dame or Yeshiva. Of course, plaintiffs are correct in a trivial way when they say education is "impressed with a public interest." Many things are. And it may even be that action in some context or other by such a University as Columbia would be subject to limitations like those confining the state. But nothing supports the thesis that university (or private elementary) "education" as such is "state action." (28:549).

The issue's complete demise, however, had still not occurred in 1976 when a student-urged public function question regarding a private university in Puerto Rico was considered by the First Circuit Court of Appeals. (12:1331). In Berrios v. Inter American University (12) the judicial panel considered the Commonwealth's regulatory scheme and its constitutional designation of education as a right but deferred to the holdings of Evans and Jackson. (12:1331-32). In expressing the same reluctance as had most other courts to find that private higher education was a public function, Campbell, nevertheless, reminded the litigants that "each situation depends on its own facts." (12:1332).

Findings of state action, therefore, although neither confined to acts of state agents nor to encroachments on functions formally declared by the states to be their own province, have been judicially avoided in matters internal to private higher education. In witnessing the doctrine's judicial evolution, however, the literature not only rationalized further incursion into private postsecondary education, it provided delimiting tests available for the reassurance of reluctant justices. The New York University Law Review's two-step nexus-aggregate test caused that periodical to predict that ultimately no state action would be found in Braden. (108:1423). A few months after the Harvard Law Review's proposed "legitimate purpose" test (70:1063), Friendly, for the Powe Court, was called upon to address the propriety of a private university's regulations concerning student demonstrations. (47:84-85). With regard to a 48-hour notice requirement, he noted:

> The provision does not seem objectionable as applied to a demonstration, such as this one, that had been planned well in advance; such notice affords a desirable opportunity for the administration and the demonstrators to work out detailed methods for the conduct of the protest in a manner compatible with the legitimate interests of all. (47:84, emphasis added).

In 1974 a group of student athletes instituted a fourteenth amendment challenge against their athletic association's eligibility rule which limited their participation in national competition. (44:1030-31). Their claim was denied the following year by the Fifth Circuit Court. (44:1028). In the Court's behalf, Thornberry decided that the association's rules met the "traditional 'minimum rationality'" standard and would be upheld because they bore some rational relationship to "legitimate stated purposes." (44:1034).

On the assumption that part of the private postsecondary institution's "legitimate purpose" was based on authority given and limitations imposed by judicial policy regarding the status of legal entities, by statutory authority, or by state charter, inquiry turned to the statutory or corporate character of private institutions. At times private organizations became vulnerable to constitutional challenges not only because they had assumed a state-like posture in influencing the lives of their constituents but because the government had yielded its prerogatives to engage in similar endeavors to the private groups. The extent to which participation in such activities was truly "voluntary" also became the basis for claimed entitlements to due process growing out of the public function component of state action.

Private Execution of State and Federal Prerogatives

With respect to legal entities in general, corporations, and sometimes their administrators, have become vulnerable to liability whenever they acted beyond the scope of their corporate authority or their actions were not within the purposes set forth in their charters. As Brody noted, however, modern corporate authority has tended to be broad and actions challenging it uncommon. (2:163). From the public purpose vantage arguments favoring the imposition of constitutional responsibility on large private corporations were not of recent origin but were promoted by Berle in 1952. (63:933). With respect to private colleges and universities in particular, advocacy for this view has been founded on the fact that since their existence and their authority to act were usually derived from the corporate laws of the state, they acted under Section 1983's "color of law" so as to make them subject to the fourteenth amendment. (81:62). The granting of corporate powers and privileges to a private university per se was judicially shunned, however, as grounds for a legally sufficient finding of state action. As noted earlier (supra 96), the rationale presented by the Court in Furomoto was that an appropriation of state prerogatives was normal for any entity granted existence under a state's corporate statutes. (24:1278). That decision perpetuated the reasoning set forth in Powe, where Friendly had stated:

> To be sure, on a strictly literal basis, whatever Alfred University does is "under color of" the . . . statute incorporating it. But this is also true of every corporation chartered under a special or even a general incorporation statute, and not even those taking the most extreme view of the concept have ever asserted that state action goes that far. (47:80).

Notwithstanding the "color of law" question, in order to subject an educational establishment to any legal liability, Aiken pointed out, it has been necessary for a plaintiff to show that the institution had some status as a distinct legal entity. (58:161). He noted, however, that in almost all cases, private colleges and universities have been found to have separate legal existence "expressly or equivalently corporate." (58:168).

Private repression, constitutionally challengeable because of state involvement, Aiken observed, has been legally vincible only to the extent that the individual rights against which there was an alleged infringement were in some way affected with the purpose of the government entanglement. (58:162-63). The contention has been advanced that monopoly status obtained through government franchise represented such an interest. (33:351). While there was some support for this argument (72:669-72), the decision in Jackson established that a quasi-public corporation's exclusive privilege was not determinative in considering whether termination of services to a customer constituted state action sufficient to impose procedural due process. (33:351-53). Although that position has been subject to some criticism (33:361-63, 366-67), the merits of the rebuttal were moot with respect to this study. As Elkind observed (72:671), in Martin v. Pacific Northwest Bell Telephone Co. (41) the Ninth Circuit held that even if a utility company's franchise were germane to its public purpose, it nevertheless could not sustain an employee who disputed his dismissal since employment practices did not represent the organization's exercise of its monopoly powers. (41:1118). In any event, in Powe it was held that education was never a state monopoly. (47:80).

In some instances the question of whether private acts could have constitutional significance resulted from challenges due to the complicity with federal rather than state government. The tests which the judiciary has applied for determining federal action have been essentially the same as the state action guidelines. (119:11-12).

The exclusive rights of a private association were constitutionally reachable in the 1944 Steele v. Louisville N.R. Co. (53) case. A black railroad worker had suffered discrimination at the persuasion of a labor union that was purportedly representing him but in which he was denied membership because of his color. (53:228). The issue of federal jurisdiction was predicated on whether a private unincorporated association was bound by constitutional proscriptions, particularly since it had been given federal statutory recognition, through the Railway Labor Act of

1926 (123), as the sole representative of a class of employees. (53:228). While the authorizing Congressional mandate compelled an employer to bargain exclusively with the majority's representative, it was held that the Act also required such representative to serve in behalf of all workers in the class. (53:232). Reversing the decree of Alabama's highest tribunal, the U.S. Supreme Court, whose opinion was delivered by Stone, found a government-like function in the union:

> For the representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations in its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights. (53:230, emphasis added).

Due process was also at issue in the litigation. Detrimental proposals against the black workers' rights to membership had been made without notice to the plaintiffs and without a hearing (53:229), and no alternative internal means for resolving their grievances were available to them. (53:233-34). Williams made the observation that, in its analysis, the Court chose to emphasize how the statute's purpose of maintaining industrial peace would be inhibited by the private discrimination rather than to address the constitutional question directly. (112:356). Schubert added, however, that concurring analysis in Steele, as well as reasoning in cases that followed it, supported a constitutional appraisal of the union's responsibilities under the Act. (107:334-35).

A private charitable foundation became the object of a lawsuit which was reviewed by the Second Circuit Court of Appeals in 1974. (100:58). In Jackson v. Statler Foundation (34) a black minister alleged racial discrimination in the refusal of a private charitable foundation in Buffalo, New York, to hire him as its director, to give scholarships to his children, or to grant money to his foundation. (34:625). It was the first state action case to challenge the tax-exempt status of private foundations (34:627) and was, therefore, measured not only by state law but also by federal Internal Revenue regulations. (34:625). In assessing the public function aspect of the foundation, the Court noted that Congress had established charitable exemptions because, except for private foundations, public funds would have to be appropriated and that these associations promoted benefits to the general welfare. (34:634).

Through Smith, the Court expounded five factors--each material; none conclusive--which it described as "important to a determination of 'state action'" (34:629):

> . . . (1) the degree to which the "private" organization is dependent on governmental aid; (2) the extent and intrusiveness of the governmental regulatory scheme; (3) whether that scheme connotes government approval of the activity or whether the assistance is merely provided to all without such connotation; (4) the extent to which the organization serves a public function or acts as a surrogate for the State; (5) whether the organization has legitimate claims to recognition as a "private" organization in associational or other constitutional terms. (34:629).

It was also held that the absence of one of these factors would not preclude a finding of state action. (34:634). Due to deficiencies in the record, the Second Circuit remanded the case to the district court (34:636) which dismissed it in 1975 because of the plaintiff's failure to comply with federal procedural requirements. (119:44). Since there was no appeal from the ruling, the Circuit Court's decision on the federal implication, including their state action criteria, became precedent. (119:44). However, unlike Jackson v. Metropolitan which demanded a nexus, it did not carry the authority of the Supreme Court. (119:38).

"Federal" State Action in a Private College and University Context

In Marjorie Webster Junior College, Inc. v. Middlestates Association of Colleges and Secondary Schools, Inc. (39) a private regional accrediting association was taken to court in 1970 because it refused to certify a proprietary junior college for women. The allegation had been based in part on the denial of due process because the association's requirement that approved institutions be nonprofit was said to be arbitrary. The U.S. Court of Appeals, D.C. Circuit, reversed a lower court which had found the fifth amendment's due process clause applicable because of federal involvement through making funds available to students of nationally accredited institutions. The court below had also supported its decision on the "developing common law regarding exclusion for membership in private associations." (39:652-53). It was the conclusion, however, and not the applicability of due process that was reversed. (39:653). Bazelon, the Appellate Court's spokesman, expressed a deference to the continued autonomy of educational institutions. (39:654). But, citing Terry, Marsh, and Steele, Bazelon commented for the Court:

> We may assume, without deciding, that either the nature of appellant's activities or the federal recognition which they are awarded renders them state action subject to the limitations of the Fifth Amendment. . . . We do not decide here the precise limits of those circumstances under which governmental action may injure the activities of proprietary institutions. (39:658-59).

To a significant extent, the federal recognition accorded to private accrediting bodies has been translated into the amount of federal money which would be made available to higher educational institutions, including proprietary and other private postsecondary institutions. Among the eligibility criteria usually promulgated by the federal government for its educational grants was accreditation by a nationally recognized association. (77:24-26). Finn prognosticated:

> The times will not readily condone small fraternities dividing public money among themselves, even in the name of science. It remains to be seen how sweeping these changes will be. At the very least they seem likely to tend toward broader participation, greater intellectual

> caution, enhanced political watchfulness, and a larger more diversified list of beneficiaries. This new democratization will probably also be slower, more cumbersome, and beset with appeals, reviews, and litigation. The accustomed delegation of governmental authority to the traditional academic and scientific elite will be less generous, and its processes and outcomes subject to more scrutiny and reversal. (77:29).

The nonrenewal of athletic coaches' contracts by state universities at the urging of a private national athletic association was held to constitutional standards because of state action. (87:547-48, 553-55). The same association had formerly caused private universities to become implicated under the amendment in their dealings with student athletes, especially where membership in the association could be attributed to each university's desire for national athletic prominence. (92:384, 392). The public function character was not of the universities but grew out of their association and complicity with their "voluntary" regulatory organization, the National Collegiate Athletic Association, which exercised quasi-legislative, quasi-executive, and quasi-judicial powers. (92:384). In 1975 the Fifth Circuit Court in Parish v. NCAA (44) had referred to the NCAA's regulation of intercollegiate athletics throughout the states as a "traditional government concern." (44:1033). Parish involved five basketball players from Centenary College, a small private institution in Louisiana, who had petitioned the Court for relief from their NCAA-declared ineligibility to compete in Association-sponsored televised games due to deficient academic performance as measured by standards set by the NCAA. Their claims were based on the fourteenth amendment due process and equal protection clauses. The Appellate Court affirmed a district court's finding of state action by the Association, although they also agreed with the lower court that the claim failed on substantive grounds. The ineligibility rule stood on its merits, and the sanctions against the private institution were sustained. (44:1030-31). Pertinent to the existence of constitutional vulnerability among private institutions in faculty-related issues was Martin's opinion that:

> The due process clause is not limited to students who may be aggrieved by NCAA actions. Charges against universities which are members of the NCAA and their athletic directors and coaches as well as their student-athletes, can range from the trivial to the serious. The coach or athletic director who is forced to resign or is otherwise disciplined when the NCAA places his university on probation for a violation in "recruiting" or some other area obviously suffers a grievous loss. In theory only the university may be before the NCAA, but as substance prevails over form, it is the individuals who suffer.
>
> The manner in which the NCAA collects its evidence, the manner in which the evidence is presented to the NCAA Committee on Infractions, and the very nature of the hearing itself and the rights accorded at it, may be constitutionally inadequate. (92:401-3).

Given the judiciary's traditional reluctance to intrude in the internal matters of associations whose membership was voluntary, the propriety of such intrusion became central to NCAA regulations challenges. (87:549). Generally, where voluntary associations were social or fraternal, they were free from judicial scrutiny; but, as in the case of labor unions, when membership became tantamount to continued employment, support for incursion by the courts became a test of "economic necessity." (124:1-2). Tucker explained:

> When a plaintiff wishes to rely upon the economic necessity doctrine, he or she must establish not only that the complained of rejection or expulsion causes unfair economic deprivation but that the defendant enjoys a monopoly status. When reasonable alternatives are available, the economic necessity doctrine may not serve as a basis for judicial relief. The economic necessity doctrine remains rather limited in scope. Absent the establishment of each of the two criteria, judicial relief is not available on behalf of one denied membership in a private association. (124:8).

Commentary in the Alabama Law Review observed that while the NCAA has not compelled membership, there has been no viable alternative association for schools desiring prestige for their athletic programs. (87:549).

Concurring in that view, Martin also suggested that significant economic benefits in the form of televised appearances, alumni contributions, and student recruitment were only possible through NCAA affiliation. (92:392).

In behalf of the District of Columbia Circuit Court's majority in Howard v. NCAA (31), decided in the same year as Parish, Tamms had little difficulty in finding state action where a student eligibility rule was concerned, in this instance based on the nature of NCAA membership. He elaborated on a point touched on in Parish (44:1032) that if the Association had been composed only of public members, its actions would be those of the state; whereas, if there were no public members, its conduct would be private. Because the degree of public participation was "substantial and pervasive," however, that Court considered the dimension of involvement by public institutions by itself an exercise of government power. (31:220).

Thus a private organization had caused a holding of government action by private universities and the attendant invocation of the fourteenth amendment. (74:546). As Faccenda and Ross observed, while such holdings were limited to a narrow set of fact situations, where applicable, they yielded a higher degree of predictability than had previous cases. (74:548).

The company town, the land grantors, and the political party, like the labor union, the charitable foundation, the accrediting association, and the athletic association were private groups seeking private objectives. Unlike the former, however, the latter organizations were given official support in the pursuit of their avowed purposes; and their functions were not originally governmental. The prior entities had been organized for the repression of other classes of citizens' rights, whereas the other associations were created to improve conditions for their constituents. Similarly, although several indicia of state involvement, such as monopoly power, state function, and being subject to federal and state regulation, bore a heavy burden of persuasion when considered separately, they continued to be promoted as components of state action in a collective appraisal. State action as a basis for continuing challenges against the conduct of private colleges and universities, therefore, while contained by the judiciary, had not been foreclosed.

It was stated as an assumption in this investigation that judicial intervention would be less likely where adequate procedures were already being provided by the institutions. It has been shown that some private institutional vulnerability existed when either sufficient state action or objective contractual expectation, or both, could be proved by a litigious professor. If he could successfully overcome the state action or contractual expectation barriers to judicial intervention, the institution's last line of defense would be that adequate procedures were internally available.

The literature was consulted next for an answer to the question of what constituted judicially sufficient procedures.

Judicial Posture Regarding Institutional Pretermination Hearings

In 1969 Frakt commented on the desirability of having some direction from the judiciary when he speculated:

> . . . particularly at the college level, some guidelines for decisions concerning retention and promotion would be more than welcome to both the administrators and faculties making the decisions and to the individual teachers under consideration, as an antidote to the often whimsical and poorly defined criteria employed in many colleges. (78:51).

The next year, before either Roth or Sindermann reached the Supreme Court, VanAlstyne, fearing that public institutional vulnerability to due process challenges would be heightened by the "liberty to teach" theme of the Roth argument, suggested that:

> . . . congestion, confusion, and endless post Roth litigation may readily be avoided if universities would now move to provide a general rule that anyone whose contract is not renewed shall receive several months advance notice, a written statement in explanation upon request, and an adequate opportunity for informal review upon request prior to the effective date of the notice. (109:877-78).

Consistent with the restraint approach, Frells observed in 1971 that some deference to internal procedures already existed in the judiciary's "exhaustion principle." Under that doctrine courts would not consider cases "ripe" for judicial review until the complaintant had exhausted all remedies available within the institution. Citing Ferguson (23:859), she noted that where a faculty member had been accorded "correct procedures" by the college administration and they had possession of substantial evidence in support of their conclusions, the courts would avoid substituting its judgment for theirs and would give the domestic deliberations "great weight." (79:4-10). Noting that in instances where private remedies had not been depleted, the courts would usually remand the dispute for internal resolution, Frells reiterated:

> For example, a teacher who is notified by the president of a university that he is recommending that the teacher be dismissed must exhaust the administrative remedies designed to forestall government action as a precedent to resorting to the federal courts. If one employs the administrative procedures, he may be able to convince the authorities not to terminate his employment. In that event he would have nothing to complain about in either the state or federal courts, and the management and controls of the schools would remain with the educational institution. (79:8).

In observing that the courts had not commonly ordered a teacher's reinstatement because of an institutional violation, Brown reported that the normal remedy was to remand for an appropriate hearing and sometimes to award damages for lost wages. According to his study, many public university regulations have gratuitously provided hearings even for nontenured teachers. In cases involving those institutions, he discovered that despite the lack of a constitutional claim, the courts have held that once adopting the procedures, the schools were compelled to abide by tham. Providing such hearings were "reasonable and nonarbitrary," he found that internal standards would take precedence over those required under a constitutional or statutory test (65:305-6), a revelation supported by Ashe and DeWolfe's research. (60:598-99). With respect to the substantiality of evidence, however, Frakt asserted that in instances where there had been a nonrenewal of teachers without tenure, the rationality of the decision was seldom provable because there was usually no record. That there had been a proper exercise of discretion by administrators, therefore, had to be taken on faith. (78:33).

The Ferguson Court established two conditions precedent to a professor's entitlement to the procedures under its holdings: (1) the termination could only be for cause and (2) the teacher must have opposed the action. (23:856). As such, no special emphasis in this inquiry was placed on the Ferguson elements of due process because, by definition, an investigation into the standards affecting nontenured faculty eliminated instances where termination could only be for cause. (93:597). At the Supreme Court level neither Roth nor Sindermann specified the form that academic hearings should take. In keeping with its prior due process holdings, however, Roth reaffirmed the propriety of employing a balancing approach for arriving at the procedural design. (15:570, note 8). Heaton concluded from that development that the standards for such balancing process had been left to the lower courts; and he found that in subsequent circuit court decisions involving tenured faculty, the Ferguson criteria continued to be applicable. (80:379-81).

The Fifth Circuit Court of Appeals in Sindermann, after deferring to the Ferguson principles where pertinent, resolved that a different standard would be appropriate when there was no expectancy of reemployment sufficient to require a showing of cause. (51:944). Clark elaborated:

> In such a situation, upon receipt of notice that a new contract will not be offered, the teacher must bear the burden both of initiating the proceedings and of proving that a wrong has been done by the collegiate action in not rehiring him. It is incumbent upon such a teacher, not the college, to shoulder these responsibilities because the college may base its decision not to reemploy a teacher without tenure or a contractual expectancy of reemployment upon any reason or upon no reason at all. (51:944).

Clark continued that the teacher's assertion would have to be either that the nonrenewal was really a form of punishment for the exercise of his constitutional rights or that it otherwise constituted an actionable wrong against him. (51:944). With respect to the right to an academic tribunal, both the Fifth Circuit in Greene (26:1135) and the Supreme Court in Sindermann (45:602) confined such actionable wrongs to instances where there had been a failure to conduct a prior hearing and where such entitlement had been created by contract or by institutional regulations, policies, and practices.

In the Fifth Circuit's remand to the district court for a determinative hearing in Sindermann, Clark acknowledged that the lower panel might find the teacher to be without an objective expectancy of reemployment. (51:943). Admonishing Sindermann for what appeared to the Court to be his failure to exploit whatever internal procedures might have been available to him, Clark reasserted both the judiciary's exhaustion and restraint philosophies by noting:

> If this be the case, then he may have "jumped the gun" in filing the present litigation. School-constituted review bodies are the most appropriate forums for initially determining issues of this type, both for the convenience of the parties and in order to bring academic expertise to bear in resolving the nice issues of administrative discipline, teacher competence and school policy, which so frequently must be balanced in reaching a proper determination. (51:944-45).

For the guidance of such "school constituted review bodies," Clark outlined what the Court considered appropriate academic hearing procedures. These minimum elements, he stated, were primarily to assist the parties in reaching a fair accord but were also designed for the accommodation of possible consequent litigation. (51:944). A summary of these procedures included:

1. The institution should give the professor prior notice of its intent not to renew his contract
2. If the teacher feels the nonrenewal constitutes a wrong against him and wishes to request a hearing, he should do so promptly and in sufficient detail to enable the institution to show any error that may exist
3. Upon receipt of the teacher's request, the institution should assemble a panel which possesses both academic expertise and an apparent impartiality toward the charges
4. The hearing procedures should allow for the right to produce witnesses and evidence and the right to confront and cross-examine witnesses produced by the opposition
5. A meaningful opportunity should be provided to develop a record of the events, and it should show that the panel based its decision on matters adduced before it (51:944)

While extolling the virtues of notice complete with reasons, explanations, and teacher-access to whatever documentation had served as the basis for the action, Frakt saw no legal obligation in the pre-Roth-Sindermann era to provide a hearing in all cases. If administrators based their decisions on issues not directly related to education, he asserted, they would have stepped outside their area of discretionary expertise and a full hearing should be granted. Otherwise, he felt that an adequate notice would suffice for probationary teachers, especially when balanced against the administration's need to maintain organizational efficiency through selective nonretention of recent faculty appointees. (78:52-53). Adequate notice apparently still did not require the giving of reasons for the decision after the 1972 fraternal holdings, although if a hearing was provided, the reasons would then become mandatory. According to Brown's analysis, a professor normally could not successfully challenge procedural adequacy for want of reasons for the nonrenewal unless he had a constitutionally protected interest. He also noted, however, that if there was any possibility of a de facto claim fostered by the college officials, the Supreme Court in Sindermann (45:593, note 2) had provided that the administration was obligated to "afford him a requested hearing where he could be informed of the grounds for his nonretention and challenge their sufficiency." (65:304).

In his analysis of cases where academic hearings had been provided and where their adequacy had been addressed by the judiciary, Heaton discovered that while such procedures need not predate an administrative decision to initiate a faculty termination, they should precede the cessation of an instructor's salary. He found that the courts had continued to respect the teacher's right to present testimony and to confront and cross-examine adverse witnesses, but they had neither insisted on court-like formality nor that such hearings be held in public. (80:381-82). Rood's analysis indicated an identical conclusion where the termination was for alleged faculty incompetence or misconduct. (105:141). When the action was for reasons beyond the control of the administration, however, he observed that there was no right to confront or cross-examine the decision makers themselves. In the latter situation the courts were satisfied with a disclosure of the criteria for the decision and of the facts pertaining to the teacher's individual case. (105:140). Rood's appraisal of that judicial posture was that where faculty suitability was not at issue, the objectivity of the criteria was paramount; but where competence was in question, emphasis shifted to the impartiality of the hearing body. (105:139-40).

Such impartiality, Brown discovered, was "liberally interpreted" by the courts. (65:305). Heaton also found that the required impartiality was normally presumed by the judges irrespective of whether members of the panel had had prior dealings with the faculty member or had participated in the initial administrative inquiry. (80:382). Concurring with that finding, Rood suggested that the cases tended to show that partiality extended more to questions of personal involvement than to administrative position or participation in the original decision to terminate. (105:140-41). Brown's analysis of post-Roth-Sindermann cases agreed that there was a presumption by the Supreme Court that unless administrative bodies had a demonstrable personal or financial stake in nonrenewal decisions which could cause conflicts of interest, they were considered sufficiently objective to satisfy the due process requirement of impartiality. (65:305).

Under the earlier Goldberg test, when state action was involved in the deprivation of a welfare recipient's future benefits, the aggrieved party was held to be entitled to representation by legal counsel. (25:270).

The Sindermann criteria had not included such requirement in teacher nonrenewal hearings. However, Rood found where such representation had been allowed, an institutional hearing withstood close judicial scrutiny. (105:140). Matheson and Baird and MacArthur found several instances where its absence did not. (93:620, 61:215). Brown's study of Fourth Circuit opinions where educational institutions were involved uncovered the same result. (65:305). As a general proposition in noncriminal proceedings, Saphire concluded that the right to counsel has been dependent on the factual complexity of the issues involved as well as the educational level or sophistication of the grievant. (106:162).

In 1971 the American Association of University Professors promulgated its "Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments" in what it considered to be the best interests of probationary faculty members. (115:8-13). Their position was that the college's substantive and procedural policies should be made known early in a faculty member's appointment and that there should be a periodic review of his standing in the institution. In the event of a nonrenewal decision, they declared that the teacher should be notified in writing and, on request, be given reasons which, if he elected to challenge, should be confirmed in writing. A faculty review committee would then investigate to see if a wrong had been committed against the teacher, if proper consideration had been given to all pertinent factors, and if stated institutional policies and procedures had been followed. The committee's findings and recommendations would be reduced to writing and forwarded to the appropriate administrative official. (115:8-13). Canavan had expressed the fear that giving reasons for nonrenewal of probationary teachers would be interpreted as tantamount to conceding an institutional need to show cause. (67:118-19). However, the AAUP statement acknowledged the desirability of managerial latitude in setting standards of fairness among probationary teachers and stressed that the giving of reasons should not be erroneously interpreted as a requirement that the administration justify its decision. (115:10). Palmer discovered that the judiciary also felt obligated to respect many reasons for nonretention of untenured teachers which would not sustain the test of cause necessary for the removal of those with tenure. (101:483).

AAUP standards had been raised in a nontenured teacher's due process challenge against his private university employer in Greenya. The Court found them irrelevant, however, because they were published after the events in contest, and, furthermore, had never been adopted by the university. (27:563).

Rood concluded that minimum institutional vulnerability to court action would occur where the administration's termination practices adhered to the following guidelines:

1. Objective termination-retention criteria should be developed and used
2. Information regarding the basis for the decision and the process followed should be disclosed
3. The names of witnesses and the nature of their testimony should be given to the teacher
4. The faculty member should be permitted to be represented by counsel
5. The instructor's arguments should be considered and his witnesses should be heard
6. The tribunal should possess academic expertise, and no member of the group should be personally involved with the professor

7. A record of the hearing should be maintained, and the panel should issue findings of fact (105:141-42)

Having elicited both judicial and scholarly guidance in anticipating which elements of an institution's procedures would render them sufficient during an adversarial confrontation, a standard had been derived against which New England's nonrenewal policies could be measured. The state action literature had left the conceptual parameters of that jurisdictional precept inconclusive. Before assessing the tenability of New England's policies, therefore, state action cases of the late 1970s were reviewed in an attempt to draw conclusions about their potential for supporting nontenured teachers in a constitutional challenge. A perspective on the viability of state action and on the vulnerability of New England's private sector was the object of the next two chapters.

Chapter Summary

Throughout the development of decisional law relating to due process, the courts have avoided mechanical definitions of the term in favor of concentrating on furthering the values it was designed to symbolize. It has been suggested that, at a minimum, due process requires rational inquiry into a dispute prior to its unilateral resolution. The concept of due process embodied in the form of a hearing has been socially perceived as equivalent to justice, a phenomenon which has given procedural due process some inherent validity as an objective in its own right. Some have argued that the unique character and mission of a university in its search for truth and learning caused the constraints imposed by due process to be inappropriate in higher education. Others contended, however, that the academic community's special purpose simply compelled due process to take a different form than might be appropriate for other sectors of the society.

The esteem in which both the public and the judiciary have historically held higher education has been attributed as the cause for traditional university autonomy. The second half of the twentieth century witnessed a disenchantment from both sectors, however, coupled with a developing judicial submission to the importance of the individual rights of teachers. These factors, combined with renewed perceptions of the social importance of academic freedom, have mitigated the restraint posture of many courts. The partial demise of strict judicial restraint was accompanied by the emergence of the concepts of property and liberty rights to teach which, when abridged by the public sector, invoked the fourteenth amendment.

Once acquired, tenure was acknowledged by the courts as a constitutional property interest. Absent the formal awarding of tenure, contractual property interests could grow out of a teacher's objective expectancy of reemployment stemming from policies and practices promulgated by institutional officials. The courts have manifested a willingness to construe such expectancy more liberally than they would interpret contracts which developed out of a commercial setting. The liberty interest was of little value to privately employed teachers, especially since their fitness to teach at private institutions continued to be a matter in which the college administration was accorded wide discretion. Moreover, the usual remedy for breach of contract was money damages, not reinstatement. Where faculty rights were affected by collective bargaining agreements, the trend of decisions seemed to suggest that other rights were being treated as having been waived by the teacher whether or not he had actually consented to the specific terms.

The maximum protections which nontenured teachers could obtain under the Constitution had only been available at public colleges and universities. The potential for private sector employees to obtain similar rights could only occur if a private institution's unique interaction with the state caused the private actions to be construed as those of a state agent. The issue, therefore, became jurisdictional; that is, "state action" became the prerequisite to federal jurisdiction in fourteenth amendment contests.

From its inception, although affected by varying social priorities, the successful assertion of state action jurisdiction most often occurred in disputes involving equal protection issues. However, the courts did acknowledge that through its constitutionally authorized civil rights legislation, the Congress intended to contain other forms of both direct and indirect involvement with the private sector.

Since state regulation has tended to limit rather than to broaden university power, it has usually failed to provide a basis for finding state agency. Similarly, state complicity through multiple contacts with private institutions, which fell short of total dominance by the government, has not implicated private university conduct. An argument not addressed by the Supreme Court has developed regarding whether state action was dependent on the aggregation of state contacts with the private institution or on a nexus between the reason for the state's involvement and the private conduct under challenge. Although state action has been successfully asserted against private parties to whom the state had relinquished some of its prerogatives, the state function approach was rejected when used to challenge private colleges and universities. Among private collegiate athletic associations, however, in which state agents held policy-making membership and which had engaged in oppressive conduct resulting in adverse financial consequences, the government's abrogation of its power had charged the private association with constitutional accountability.

As an outgrowth of their continuing restraint posture, the courts have exhibited a deference to university administrators' nonrenewal decisions when legally sufficient procedures were made available to the teacher. Although institutions were obligated to initiate procedures and show "cause" for terminated professors who had tenure, nontenured teachers bore the burden of both initiation and proof that a wrong had been committed against them. In the interest of reaching a fair resolution of nonrenewal disputes and of facilitating possible future litigation, the judiciary recommended prior notice, an adversarial hearing on request before a qualified tribunal, and the development of a record. The character of each of the procedural components necessary to sustain a faculty challenge varied somewhat with each set of facts.

CHAPTER III

AN ANALYSIS OF THE STATUS OF STATE ACTION IN PRIVATE HIGHER EDUCATION

Introduction

The essential autonomy of private higher education, established in the pre-fourteenth amendment Dartmouth decision, was never overturned. (100:58). The post-amendment Civil Rights Cases limited responsibility for constitutional promises to actions of the state, but subsequent litigation extended the obligations to state agents. Because of that agency ingression and because of higher education's growing complicity with the government, there was reason to inquire into the susceptibility of independent institutions of learning to constrictions similar to those placed on the sovereignty. The status of judicial response at the close of the 1970s to the applicability of fourteenth amendment constraints to faculty employment policies in the private postsecondary sector was the object of this analysis.

Despite the assertion of one study (119) and while new areas of exposure may have emerged since 1962 (74:543-48), the literature survey provided reason to doubt that due process procedures will be imposed on the private sector of higher education by the courts. Although the literature revealed minimal levels of procedural accountability, however, it did not suggest that constitutional vulnerability was nonexistent.

Background

When the first state action challenge was made in 1961 against a private university, the district court judge found sufficient state involvement for a summary judgment against the university. (29:675). It was only after his judgment was stayed and the case reheard by a newly constituted court that the state's participation was deemed insufficient. (108:1403, note 17). Although in 1962 the Appellate Court agreed with the no state action holding, it did observe that a private university could freely associate itself with the state in such a way as to make its private activity subject to the fourteenth amendment. (29:682). The Powe Court found state action in 1968 in the private college activities which were completely state dominated. (47:82-83). Also in 1968 in Grossner (28:553-54) and again in 1977 in Braden (16:955-56), the courts refused to summarily rule that conduct of the private universities was not state action. The fact that the Grossner Court used the phrases "as such" (28:549) in its public function rejection and "without a good deal more" (28:548) in eliminating funding as a contestant for state action indicated the presence of some judicial receptivity to further arguments supporting private state action claims. Limited evidence was found that the judiciary was willing to intrude in private postsecondary affairs where private organizations had assumed regulatory powers over individuals (44:1032-33) who, for want of viable alternative association and out of economic necessity (124:8), had little meaningful choice but to conform to the dictates of the private organization.

On the other hand, most forms of state involvement in private pedagogical affairs were insufficient to hold the actors constitutionally accountable. (108:1403-4). Although Evans was not a case involving education, the Court made it a point to observe that if a school had been left to the city instead of a park, it was not likely that state action would have been found. (22:300-301). The Guillory Court rejected several types of seemingly implicating university-state conjointment as adequate for a holding of state action (29:679), and Grossner decreed that the performance of a state function by the university would not render its conduct as fourteenth amendment state action. (28:549). Even when the Powe Court found state complicity because of direct state control, it chose to enforce its preferred remedy (59:725-26) of severing the state action effects from the private action effects of the same conduct even though it meant unequal treatment of students on the same campus. (47:81-82). Refusing to treat the university as a state agent with respect to its activities which were not state dominated, the Court declared that private higher education was not a public function. (47:80). In Parish and especially in Howard the NCAA's constitutional responsibility was contingent on identifiable state participation at the policy-making level. (44:1032-33, 31:219). Furthermore, the student-athlete grievants were denied a court remedy since the association's eligibility rules and procedures were sufficiently related to its legitimate purposes and thus comported with due process. (44:1034).

A district court did find the circumstances of a 1974 civil rights dispute sufficient for it to aggregate factors of state action against a private university. Declining to identify the private institution's conduct as state action per se, the court described the university's relationship with the state as a "position of interdependence" and the parties as "joint participants" in the challenged conduct. (48:1004). One team of investigators integrated these findings with other rulings which were consumated in the same year. (119:44-50). Their conclusion was that when trends in the case law were combined with the trends toward increasing state contacts with, and support for, private institutions, a trend could be expected toward increasing application of the state action doctrine to the private sector of higher education. (119:50-51). The ensuing analysis disputed that conclusion.

Sex Discrimination and the Nexus-Aggregate Argument

In their 1977 study of the interrelationships between the states and private higher education, Hendrickson and Mangum cited three sex discrimination cases which, in their view, precipitated a challenge to the Supreme Court's nexus prerequisite to a finding of state action in the private sector. (119:38-51). Rackin, Cohen, and Braden reached the courts after Congress had enacted the 1972 Civil Rights amendments barring educational institutions from employment discrimination on the basis of sex.

The last word from the Supreme Court regarding its nexus-aggregate posture was on December 23, 1974, in Jackson v. Metropolitan. (33:345). In that case, the essentiality of a link between the state's involvement and the challenged conduct was adopted. (33:351). Jackson v. Statler, which was decided on December 4, 1973, and revised on April 5, 1974 (34:623), had promulgated five criteria for state action (supra 104) which became the basis for Rackin's December 18, 1974, finding of state action in a private university's discriminatory conduct. (48:995-96). That development, combined with Marshall's dissent in Jackson v. Metropolitan, formed the basis for Hendrickson's and Mangum's conclusion that a trend had begun to develop away from the "point of contact" approach to state action and toward the "broad sweep" approach, thus signaling an increase in constitutional vulnerability among private educational institutions. (119:50-51, 222-24).

The timing of these decisions, however, could cast doubt on the conclusions of Hendrickson's and Mangum's study. That chronology, along with some differences between Statler and Rackin and the directions taken by Cohen and Braden, provided reasons to view any suggested trend toward a "broad sweep" approach to state action with reservation.

The Study credited Moose Lodge with having established the need for a necessary connection, stating:

> Most importantly, the [Moose Lodge] court held that in order for an action of a private entity to be an unconstitutional exercise of state action a "sufficiently close nexus" must exist between the challenged action and the involvement of the state. . . . The regulation by the state of the liquor license held by Moose Lodge did not connote state approval of the private club's racial discrimination. (119:20, citation omitted).

It was the Metropolitan Court, however, which specified:

> But the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself. (33:351, emphasis added).

In arriving at the above conclusion, Metropolitan had cited Moose Lodge's refusal to treat the extensive regulation by the state as fostering racial discrimination. (33:351). The Study acknowledged that Metropolitan also required a nexus. (119:22) However, the significance of the question regarding which of the two cases originated the nexus test was in the importance that could be attached to the factors of state action promulgated by Statler, perpetuated by Rackin, and used as the basis for the Study's prognostication.

Statler, an appellate court, devoted a small part of its analysis to evaluating the Supreme Court's Moose Lodge decision, and then only to the extent that the latter had reinterated a need to "sift facts and weigh circumstances." (34:626-27). In his dissent, Friendly allotted somewhat more attention to it and came closer to the point by noting that the state's regulatory scheme had not constituted support for the alleged wrong sufficient to implicate the government in the private conduct. (34:638-39). In neither instance was there any mention of the Supreme Court's "sufficiently close nexus" test which, of course, there could not have been since it was not established until ten months later. (34:623, 33:345). Because the Supreme Court had not imposed a positive nexus requirement when Statler was considered and because there was less than a clear understanding of what the Moose Lodge holding required (72:670, 688-89), the Statler Court was free to read the state action cases which had been decided up to that time as consistent with what had until then been a continuous expansion of Burton's combination approach. (114:521-22). For the same reason, Rackin, decided five days before Metropolitan, was not bound by any positive nexus requirement. The panel acknowledged that the Supreme Court had already granted certiorari to the appellants in Metropolitan when Rackin was being decided, but the judge in the latter case did not think the facts of the former, as he understood them, were sufficient to narrow the older aggregate test. (48:1004). Moreover, since Rackin was a lower court than Statler, it was bound by rules of precedent (2:41) to follow the teachings of the higher tribunal. Neither Statler nor Rackin could be interpreted as signaling a trend away from the nexus requirement since that prerequisite was not established until after those cases had been decided; and the nexus test, when it was ordained, carried the influence of the Supreme Court. The latter pronouncement, if it was truly a necessary state action test, would, in fact, overrule both Statler and Rackin.

Evidence that the lower courts had interpreted Moose Lodge differently than the Supreme Court's impending pronouncement was revealed by the Rackin Court's analysis, wherein Weiner asserted:

> The Moose Lodge Court clearly indicated that Burton stood for the proposition that the existence of a symbiotic relationship between the State and the private party charged with illegal discrimination may, without the showing of a direct nexus, make the State a joint participant in the illegal conduct sufficient to bring the discrimination within the prohibitions of the Fourteenth Amendment. No such relationship was alleged or could be proven in Moose Lodge and therefore the Court confined its inquiry to the distinct issues of whether the State, in any way, directly fostered or encouraged discrimination. The Supreme Court did not overrule the means recognized in Burton to prove "state action" nor in any way suggest that a direct nexus must be exposed between the State and the private party in order to prove constitutionally impermissable discrimination. (48:1003).

Weiner buttressed his argument by noting that Braden, a "post Moose Lodge decision," had sustained Burton's combination approach. (48:1003). Differences in the purposes of the Rackin and Braden cases, however, and subsequent developments in the latter provided marginal support from Weiner's selected reinforcement.

Rules of Procedure Distractions

In 1972 the district court had dismissed the plaintiff Braden's complaint for lack of Section 1983 jurisdiction. On appeal that dismissal was vacated by the Third Circuit, and the district court was ordered to conduct a discovery on the state action question. (16:949-50). With respect to the nature and purpose of discovery proceedings, Brody explained:

> The term discovery means the procedure of obtaining facts by both parties prior to the actual trial. Before the adoption of the modern rules of civil procedure in 1938, the theory behind litigation was that many facts could remain concealed until the time of the trial; at trial such facts would be disclosed for the first time. Trials, therefore, were often filled with surprises, and the "sporting theory of justice" was the rule of the day.
>
> The theory of modern-day civil trials is that all significant facts should be brought out before the trial, and that both parties should be fully apprised of all aspects of the opponent's case. (2:94).

The overall relationship test was used in the evidentiary hearing following the discovery, at which time the district court, in 1975, denied a renewed dismissal motion on the grounds that state action might well exist. The denial of the dismissal motion was appealed in December of 1975, argued in May of 1976, reargued in November of 1976, and affirmed in March of 1977 (16:950) with orders that it be remanded to the district court for its findings on the question of state action. (16:965). In deciding on the dismissal motion, the Circuit Court's analysis of the "overall relationship" was not for the purpose of a finding on the state action question but for the purpose of ruling on the motion. (16:955).

Weiner was correct. Braden had used an overall analysis; but because of the nature of the inquiry, the rules of evidence required greater deference to the plaintiff. (16:955). Adams spoke for the full Braden Court when he noted:

> . . . since the dismissal motion was submitted by . . . [the University of Pittsburgh], Dr. Braden, as the opposing party, is entitled to the benefit of all reasonable doubts and inferences which may arise in connection with consideration of such a motion. (16:955).

In a concurring opinion, however, Garth added:

> While this treatment of the evidence is unobjectionable at this stage of the proceedings, at the final judgment stage the district court will obviously have to view the evidence quite differently. It will have to consider both the language of the statute and the testimony of the trustees which Braden I required the district court to take. In addition, since Dr. Braden will not automatically be given the benefit of all reasonable doubts and inferences at that stage, the district court will be free to give the language of the statute and the testimony of the trustees the weight which it believes they deserve. . . .
>
> It is evident to me that on remand the district court will be hard pressed to find state involvement if limited to the testimony taken to date--which of course it will not be. (16:967-68, 977).

Therefore, whereas Rackin's use of the aggregate analysis was made for a finding of state action (48:995), Braden weighed the combination of factors in order to determine whether or not to overrule a dismissal motion and was governed by different rules of procedure. In any event, Garth's conviction of insufficient state involvement had not been tested by the district court at the midpoint of 1979. A few months earlier the plaintiff, Braden, died; and on June 29, following an order denying a motion for the class action, Simmons dismissed the case with prejudice. (116:3).

Other observations which could be made with regard to the developing "broad sweep" proposition inspired by Statler and Rackin concerned a number of factual differences between the two cases.

In Statler the plaintiff had elected to plead his case pro se, that is, without counsel; and the rules of procedure thus commanded the Court to construe the complaint generously in his behalf. (34:626). The challenge was largely an argument over what had been the intent of the federal government when they originally provided for the tax-exempt status. (34:629-33). The Court entertained evidence that engaging in a charitable foundation could constitute a federal function. (34:633-34). Although Grossner had already established in 1968 that private university education was not a public function (28:549), the Study's analogy between the tax-exempt foundation and the private university (119:51) was not without support. In his analysis of risks borne by educational institutions, Aiken placed nonprofit colleges and universities in the same legal classification as that of public charities because of their contribution to public education and their nontaxable endowments solicited from the public. (58:161-62).

Noting that there were other factual differences in the cases, the Statler panel identified as "significant" the fact that in prior litigation involving tax-exempt organizations, state action had been found where racial discrimination was involved but that the courts had not assumed jurisdiction when the issues concerned other constitutional claims such as due process and freedom of speech. (34:628). The Court's spokesman, Smith, noted: "This dichotomy is explained in part by the double 'state action' standard which has been recognized--one a less onerous test for cases involving racial discrimination, and a more rigorous standard for other claims." (34:629). Antoun found that the lesser state involvement requirement had also been respected where racial discrimination was at issue in private higher education because the elimination of racial abuses was the object of the fourteenth amendment. (59:726-27). When Aiken's investigation turned to the "double standard of state action," it revealed a judicial reluctance to attempt any balancing process between the evils of sex discrimination and those of racial discrimination; therefore, the "double standard" gave sex discrimination cases a higher judicial priority than Powe's student discipline dispute. (58:164). In any event, the Rackin issue dealt directly with sex discrimination in an educational institution; and that problem was contemplated by Congress when the 1972 Civil Rights amendment was enacted. (118). The Court, in holding the amendment retroactive, ruled that the statute should be "construed liberally" so that relief could be granted "to remedy present and continuing effects of discrimination." (48:1006-7).

Thus a generous ruling became the precedent for a case in which there was an established wrong (48:1006-7) expressly forbidden by Congress. If Yackle's appraisal of the judicial restraint policy was correct, courts would be disposed to enforce what Congress mandated under its enforcement authority where they otherwise would avoid intrusion. (114:480-81).

One of the judges in Statler had requested a reconsideration of the state action question by the full bench; but because of a four-to-four split on a vote for that request, it was denied. As one of those who dissented to the denial, Friendly called the majority's finding of government action "analytically unsound, dangerously open-ended, and at war with controlling precedent both in the Supreme Court and in this Circuit. Indeed . . . it seems to me the most ill-advised decision with respect to 'state action' yet rendered by any court." (34:636-37).

Although Rackin, decided by a district court and before Metropolitan, supported its findings on Statler, the Cohen decision rendered at the higher appellate level and after Metropolitan, made no mention of Statler. Despite the existence of such factors as "Illinois" in the university's corporate name, its receipt of state support, and its heavy regulation by the state, Cohen followed Metropolitan's nexus rationale in its finding of no state action because the state's involvement had not constituted support for the claimed sex discrimination. (20:824-26). The plaintiff, a female faculty member, had been dismissed from the post-secondary institution without a statement of reasons. (20:821-22). The Braden Court, also at the appellate level and also involving alleged sex discrimination, made no mention of Statler. By legislative design, however, Braden's University of Pittsburgh was more extensively involved with the state of Pennsylvania than was Rackin's University of Pennsylvania. (48:996, 16:955). Unlike Rackin, the alleged wrongs in both Cohen and Braden were committed before the effective date of the 1972 amendments and the Congressional mandate was inapplicable. (20:822, 108:1405). Without legislative support, therefore, the last two cases were predicated solely on the basis of state action theory.

Addressing the Substantive Question

Whether the factors of state action from Statler were the true causes of Rackin's finding of state action, as Hendrickson and Mangum persuaded, or whether to a greater extent the finding was supported by the same logic that Garth asserted when he proposed a "state dominance" test as an equivalent to the nexus standard (16:974) may have been revealed in the Rackin majority's opinion, where Weiner stated:

> The Commonwealth, in effect, maintains a stranglehold on the University and therefore potentially has significant input into University policies.
>
> The University has not remained impervious to this reality as evidenced by its varying admissions standards . . . and reducing tuition for Pennsylvania residents. In light of these concessions, which the University considers contrary to its sound academic and policies, we doubt that the University would ever make major policy decisions without looking over its shoulder to gauge the attitude of its omnipresent informal partner. (48:1005).

Aggrieved individuals who wished to allege a wrong under the sex discrimination amendment might not have had to place the same heavy reliance on state action claims as did those whose challenges were founded on the Constitution of its own volition. As Oaks explained, the federal government has had administrative avenues for enforcing compliance at "every educational program and activity at every college or university receiving any federal financial assistance for any individual program or activity, . . . a Basic Equal Opportunity Grant, or a federally funded insured loan. (96:4). Similarly, given the authority assumed by the National Labor Relations Board since 1970, complaints under a faculty bargained agreement at the larger institutions have not been constrained by fourteenth amendment limitations. (74:554). On the other hand, Baird and MacArthur did report that in the pursuit of their own "institutional interests," labor organizations have wrested permission from their constituents to incorporate grievance provisions into their collective bargaining agreements which keep procedural issues away from judicial or administrative devices and toward either union disposition or arbitration. (61:219-20).

With regard to faculty employment security as a general proposition, even if the Metropolitan test of a requisite connection were abandoned and the Burton cumulative standard were fully reconstituted, there would be little reason to expect court-imposed due process in the private sector. As the New York University Law Review noted, if the plaintiff had been a waiter dismissed without notice or a hearing instead of a black customer, judicial relief would not likely have been granted because the reason for the state's involvement was incidental to the restaurant's hiring policies. (108:1420). Applying the type of state benefit standard, which Burton had required (17:861), to a private educational setting, they concluded that "an effort to ensure adequate educational opportunities for higher education for aspiring students in the state is not necessarily an effort to ensure adequate opportunities for teaching positions in the assisted institutions." (108:1424).

While the fourteenth amendment may have been the cause of some due process vulnerability in the private sector, it may also have been a latent device for the containment thereof. Rood's review of judicial response to Bill of Rights litigation led him to conclude that the provisions of the first ten amendments were incorporated in the fourteenth. (105:127). If Oak's assessment of the first amendment prerogatives of higher education was correct and if the fourteenth amendment could be used as a safeguard of those rights as he asserted, the Constitution could potentially serve as the protector of private autonomy. (96:10-12).

Yackle expressed a similar posture respecting the constitutional limit on state encroachment against private postsecondary affairs (114:526); but in regard to private vulnerability outside the Constitution, he added:

> . . . it can hardly be doubted that the states might have reached, indeed may yet reach, the same results sought by the litigants in the major state action cases--but through nonconstitutional means. Thus, Missouri might have outlawed restrictive covenants, the Wilmington Parking Authority might have inserted in its contract with the Eagle Coffee Shoppe a prohibition on race discrimination, California voters might have rejected Proposition 14 and thereby chosen to retain existing open housing legislation, Pennsylvania might have adopted a public accommodation law, the city of Portland might have conditioned its support of Lloyd [Shopping] Center on the Center's agreement to permit expression-related activity in the mall, the city of Montgomery might have barred the discriminatory use of its public facilities, and finally, Pennsylvania might have added to its many utility regulations one more requiring notice and a hearing before service is terminated. The point is belabored but important. (114:527).

Moreover, despite observations by Yackle that judicial restraint had been reaffirmed in the Burger Court (114:480) and by Saphire that the Burger Court was less responsive to individual liberties than had been its predecessor (106:194), Saphire was not willing to concede a wholesale retrenchment from the expansion of due process applicability, reasoning:

> Although due process can be properly viewed as a moral command, its meaning need not depend upon the particular moral philosophy of a particular judge. Instead, the values that define individual dignity may also be found in a constitution, even when the document is viewed not as a mandate for a particular moral vision, but as a framework for structure and process. (106:194-95).

Conclusions

State action, then, could occur at such time as the state may elect to promote employment of teachers. In addition, if the Congress decided to protect any classes of pedagogues whom it viewed as having been deprived of rights because of discrimination by an institution, the courts might apply Smith's "double state action standard" against the university. If state action could be proved and the nontenured privately employed teacher could demonstrate that one of his liberty or property interests had been abridged, Roth and Sindermann provided some--albeit limited--basis for a fourteenth amendment challenge. Absent state action or a possible activation of a state's latent regulatory power to compel proceduralism, private institutional vulnerability would be contingent upon express or implied rights relinquished by the college to the professor through contract. The implied expectancy of reemployment test was not necessarily premised on divestiture by a state institution.

In 1972 the Supreme Court affirmed the Fifth Circuit's 1970 remand of Sindermann to the district court for a finding of whether or not the nontenured junior college professor had an objectively determined expectancy of reemployment under institutional policies and practices. (45:603). With regard to procedures, the Circuit Court had made a threshold distinction about who should initiate a hearing. Irrespective of whether it was formal or de facto, they stated that if a professor had tenure, he would be entitled to the safeguards in Ferguson (23:856); that is, that the college be required to show cause for the nonrenewal. (51:943-44). In the absence of any form of tenure, however, the Circuit Court stated that if the expectancy did not require a showing of cause, the teacher would have to initiate the process himself because, in Clark's words:

> A requirement such as plaintiff suggests, that a college must always assign a cause for not renewing the contract of any teacher on its staff would have the legal effect of improperly denying to colleges freedom of contract to employ personnel on a probationary basis or under annual contracts which are unfettered by any reemployment obligation. Every teacher would thus be granted substantial tenure rights by court edict. Courts do not make contracts for colleges or teachers any more than for any other litigants. (51:944).

When the issue reached the highest Court, Stewart was careful to limit that panel's support of the lower ruling to instances where the teacher could prove the "legitimacy of his claim of such entitlements in light of the 'policies and practices of the institution.'" (45:603).

When the concept that a professor could predicate his procedural claim on university practices originated in Greene, state action was not at issue. Rather, that case affirmed that teachers' rights at private colleges were established by contract and that in a "community of scholars" the terms of such agreements could be supplemented by the regulations and practices of the institution. The nontenured teachers at that private university acquired procedural rights because the Court perceived an implied contractual obligation to do so. (26:1132-35). The issue progressed through a public university in Ferguson at a time when there was a well-advanced trend in educational adjudication away from the privilege doctrine toward the liberty and property concepts. (60:563, 580). The contractual implications continued to have significance; but since Ferguson, Roth, and Sindermann all concerned the public sector, the institutions involved were vulnerable to constitutional challenges. Ferguson expanded Greene's holding from an expectancy of pretermination hearings (26:1135) to an expectancy of reemployment. (23:856). Sindermann added the possibility of de facto tenure. (45:600-603).

In the public sector, professorial litigation could be constitutionally grounded in the contractual property interest or, in the absence of such an interest, in the claimed deprivation of a protected liberty. If, however, the severing institution gave no reason for the nonrenewal and there was a clear probationary designation, nontenured teachers were unlikely to succeed in due process challenges. (105:138). Absent state action specifically promoting the employment of teachers, constitutional support was even weaker among professors at private universities. If a fourteenth amendment case could be successfully asserted, however, procedural standards had been made available in Ferguson. If not, the professor at a private college or university could return to Greene's concept of an implied contract growing out of university regulations and practices--if such regulations and practices existed. Aside from the "constitutional" ramifications of Sindermann and Roth, "contractual" expectations were acknowledged throughout those decisions and were also referred to in a concurring opinion by Burger who, after reiterating that property interests were not created by the Constitution, said:

> Because the availability of the Fourteenth Amendment right to a prior administrative hearing turns in each case on a question of state law, the issue of abstention will arise in future cases contesting whether a particular teacher is entitled to a hearing prior to nonrenewal of his contract. If relevant state contract law is unclear, a federal court should, in my view, abstain from deciding whether he is constitutionally entitled to a prior hearing, and the teacher should be left to resort to state courts on the questions arising under state law. (45:604).

Canavan had stated that while formal procedures may be desirable or even necessary, they would vary with the kind of institution. (67:117). In the next chapter attention turned to the private sector of New England to determine how great was the variation among their different kinds of institutions and to assess their vulnerability to challenges by nontenured teachers who could present acknowledgeable claims to due process.

Chapter Summary

Because conclusions in the literature about the viability of "state action" were tenuous, an analysis of state action cases was undertaken in an attempt to measure the doctrine's potential as a vehicle for faculty invasion.

From the inception of higher education's entry into the state action debate, the courts have left open the possibility that state-private university interaction could be such that the private conduct would be constitutionally proscribed. Generally, however, state action had not been found in the conduct of private postsecondary institutions. In fact, when complicity seemed imminently incriminating, the courts exhibited a preference for severing the state from the private action. Nevertheless, on the finding of a 1974 district court decision which acknowledged state action by a private university's discrimination against a female professor, one study prognosticated a trend toward increasing bases for private institutional vulnerability.

In reviewing the circumstances and related decisions which gave rise to that observation, this analysis came to a different conclusion. Because of the peculiarities of the rules of procedure, because of the sequence of decisions, and because Congress had addressed sex discrimination directly, this inquiry observed no expanded grounds for acquiring state action jurisdiction. On the contrary, the analysis of decisions led to the view that the Supreme Court continued to be abstention-oriented in regard to higher education. On the basis of state action decisions which had emanated from the highest tribunal, there was more reason to expect narrower than broader definitions of private conduct which could be regarded as state action. The possibility of nontenured teachers successfully gaining constitutional advantages at private postsecondary institutions, however, had not been foreclosed.

CHAPTER IV

DUE PROCESS POLICIES IN NEW ENGLAND'S PRIVATE SECTOR

Nature and Purpose of the Study

The research supported the presumption that there were circumstances under which nontenured teachers at private postsecondary colleges and universities could acquire either contractual or constitutional due process grounds for court challenges to decisions not to renew their contracts. The underlying assumption in the inquiry had been that to the extent that those grounds were present and private institutions had failed to provide due process safeguards as judicially perceived, they were susceptible to adverse litigation. It had been hypothesized that because of the traditional judicial restraint posture toward private higher education, because of the pervasiveness of tenure systems, and because constitutional proscriptions were generally confined to government activity, private institutions in New England had not granted sufficient due process to make them invulnerable to court challenges against their unilateral failure to renew nontenured teachers' contracts.

The hypothesis was tested by means of an analytical survey of the procedural due process policies as they existed during the spring of 1979 throughout the entire population. The population was defined as all postsecondary educational institutions in New England classified as private in 1977-78 by the New England Board of Higher Education. (122:4-29). It was then adjusted by the number of institutions which were reported in the Chronicle of Higher Education on December 18, 1978, as having closed, shifted to public control, or merged with other institutions (102:7-8), and by the survey respondents who reported that their institutions had closed or merged. In discussing methods of analyzing and presenting information in a study, Clover and Balsley suggested that more observations could be made and reported by cross-classifying information than by reporting single classifications. They indicated that in addition to giving original figures, cross-classification normally included percentages. (3:175). The data obtained from the survey were presented, therefore, cross-classified by the variables that could be observed and, unless prohibited by the statistical technique employed, were reported by both figures and percentages.

Table 1.1 shows that the maximum number of institutions that could have responded to the survey in each state was: Connecticut, 24; Maine, 18; Massachusetts, 88; New Hampshire, 15; Rhode Island, 9; and Vermont, 14; for a total of 168. The aggregate response rate was 87.5 percent with no state response of less than 80.7 percent.

Design and Methodology

The first step in the survey procedure was to construct a mail questionnaire listing those elements of procedural due process which, where provided, could be expected to sustain close judicial scrutiny as established in Chapter II. Through the instrument, information was sought regarding the existence of administratively promulgated termination and nonrenewal policies affecting teachers without tenure. The questionnaire made inquiries about all the components of due process which had been judicially determined as sufficient to accommodate academic

TABLE 1.1

PROFILE OF THE POPULATION

Institutions Responding to the Survey

Institution Size	Total	CT	ME	MA	NH	RI	VT
Over 5000	13	4	NA	7	NA	2	NA
1001-5000	53	7	4	29	5	4	4
501-1000	30	3	4	14	5	2	2
500 or Less	50	8	10	21	4	NA	7
Not Applicable*	1	1					
Totals	147	23	18	71**	14	8	13
Percents	87.5	95.8	100.0	80.7	93.3	88.9	92.9

Institutions Not Responding to the Survey

Institution Size	Total	CT	ME	MA	NH	RI	VT
Over 5000	2	1	NA	0	NA	1	NA
1001-5000	3	0	0	3	0	0	0
501-1000	7	0	0	7	0	0	0
500 or Less	9	0	0	7	1	NA	1
Totals	21	1	0	17	1	1	1
Percents	12.5	4.2	0	19.3	6.7	11.1	7.1

*Nontraditional institution, size classification not applicable.

**One Massachusetts institution with a student enrollment of less than 500 refused to answer any questions. In subsequent analyses Massachusetts was credited with 70 responses and New England with 146.

procedures. Except where there were complex facts or where potentially an unusual detriment would be suffered by a teacher from his lost position, Chapter II had not found a necessity for providing legal counsel. Nevertheless, the instrument asked about the availability of protections in addition to the essentials and whether or not there was an entitlement to legal representation. While these non-elementals could not be used to determine the existence of due process, knowledge of their presence could reveal whether any of the private institutions surpassed their potential obligations and thus increased their invincibility to faculty assault. Primarily, however, the questionnaire was designed to determine to what extent the relevant procedural safeguards were being provided at each responding institution.

The inquiry was addressed to the highest academic officer at each school on the assumption that such individual would be knowledgeable about his institution's academic personnel policies. The study was conducted in the spring when new contracts would normally be tendered or withheld because that was presumed to be a time of high awareness about contract policies and practices.

Field Testing

A prior field test of the survey instrument was conducted during February 1979. Four academic vice presidents at separate private postsecondary institutions were contacted in order to solicit their participation in the preliminary study. Having obtained their consent and having scheduled follow-up interviews, copies of a letter of transmittal and the questionnaire were mailed to each participant. No prior information was given about the nature of the study, and they were asked to answer the questions exclusively on the basis of information provided in the accompanying instructions.

Within five days of their receipt of the questionnaires, all four participants were personally interviewed in their offices. The sessions lasted from forty-five minutes to slightly more than two hours. Interview questions pertained to (1) the letter of transmittal, (2) the instructions, and (3) the questionnaire. The questions were asked while the participants had the completed documents before them. In all cases the interviews were informal and the participants initiated their own observations about the survey instrument. If their open-ended observations did not otherwise do so, questions asked of them queried their understanding of the purpose and value of the study, whether it was clear that the study pertained to nontenured teachers, and if they understood that their answers had to be based on institutional policies. They were asked to interpret the terms used, the meaning of each question, and whether they perceived any differences in interpretations of termination and nonrenewal decisions.

The participants' interpretations were consistent with each other and none perceived any differences between decisions to terminate or not to renew a nontenured teacher's contract. Generally, their suggestions were directed to the structural format of the instructions and to minimizing the "legalistic" style of writing. In addition the clarity of some of the questions was improved. Otherwise, no substantive revision of the documents resulted from the field test; but the revised questionnaire was mailed to the participants and after telephone communications with each, there was unanimous agreement that the survey instrument should accomplish its purpose. Figures 1.1 and 1.2 show the revised instrument.

FIGURE 1.1

QUESTIONNAIRE

Faculty Termination or Nonrenewal Policy

ALL QUESTIONS PERTAIN TO POLICIES REGARDING FACULTY MEMBERS AT YOUR INSTITUTION WHO DO NOT HAVE TENURE OR WHO ARE CLASSIFIED AS PROBATIONARY

Responding institutions are identified for the purpose of classification. Only aggregate responses will be reported in the study. In no instance will institutional identity be revealed.

Directions

A. Place a checkmark in the "Yes" column if the procedure is known or strongly believed to exist by any one or a combination of the following:

   (1) expressed administrative policy, either publicly stated or in written communications,

   (2) provision in the faculty manual,

   (3) custom or past practice of your institution,

   (4) contract, whether negotiated individually or through collective bargaining.

B. Place a checkmark in the "No" column if the procedure

   (1) is known or strongly believed to be contrary to stated administrative policy,

   (2) has never been provided and/or is known to have been denied,

   (3) is extremely unlikely to the point that you strongly believe the right does not exist.

C. Otherwise, check "Uncertain" but only if the question clearly cannot be answered either "Yes" or "No".

FIGURE 1.2

Name of Institution:

	Yes	No	Un-certain
1. Is a nontenured faculty member given advance notice of the institution's decision to terminate or not to renew his or her contract?	( )	( )	( )
IF YES			
(a) Is the notice in writing?	( )	( )	( )
(b) Does the notice give reasons for the decision?	( )	( )	( )
2. If the nontenured faculty member asserts that the nonrenewal or termination constitutes a wrong against him or her and makes timely notice to the appropriate person or committee requesting a hearing, will the hearing be granted?	( )	( )	( )
IF YES			
(a) Will the hearing be before a panel which			
1. possesses academic expertise?	( )	( )	( )
2. is apparently impartial toward the actions taken?	( )	( )	( )
(b) Will the faculty member be entitled to			
1. produce witnesses and evidence?	( )	( )	( )
2. face witnesses produced by the institution?	( )	( )	( )
3. cross-examine witnesses produced by the institution?	( )	( )	( )
(c) Will the faculty member be entitled to representation by legal counsel?	( )	( )	( )
3. Will an opportunity be provided for the development of a record of the proceedings if a hearing is held; or if no hearing, of the events leading to the decision not to renew or to terminate?	( )	( )	( )
IF YES			
(a) Will the record demonstrate that the decision was arrived at through appraisal of the evidence?	( )	( )	( )
4. In your opinion does your institution provide protections to the nontenured faculty members in addition to those enumerated on this questionnaire?	( )	( )	( )

The Survey

In their study of mail surveys and response rates, Kanuk and Berenson found multiple mailings to be the most effective technique for maximizing the number of returns. (88:441, 450). Therefore, questionnaires were mailed out during each of the four months of March through June, with the mailings timed to avoid school vacations. All letters of transmittal in the original and follow-up mailings were individually typed and signed and each included a printed self-addressed, stamped envelope. A copy of the questionnaire, on which the institution's name was pretyped, was enclosed with each mailing. In every case the letters were addressed to the highest academic officer listed in Education Directory, Colleges and Universities 1977-78. (127:63-69, 154-57, 165-82, 230-33, 360-62, 406-9). The original letter of transmittal described the nature and purpose of the study, and each succeeding letter stressed the importance of returning the information. (See Appendix A).

Table 1.2 shows that the first mailing yielded a response of nearly 50 percent; and the following three returned approximately 25 percent, 7 percent, and 6 percent respectively, for a total response of 87½ percent. The earliest returns came from the largest colleges and universities and from both the northern and southernmost points of the region. The institutions in Massachusetts returned the smallest percentage overall but represented over three and one half times as many institutions as did the next highest state of Connecticut. The three northern states each had fewer than twenty schools--none of which were in the largest category--and responses exceeded 92 percent. Rhode Island, with nine possible responses, returned slightly less than 89 percent. The state of Maine was the only state in which all the institutions participated.

TABLE 1.2

RESPONSES TO THE SURVEY

Maximum Possible Returns

Institution Size	Total	CT	ME	MA	NH	RI	VT
All Institutions	168	24	18	88	15	9	14

First Mailing, March 30

Over 5000	12	3	NA	7	NA	2	NA
1001-5000	35	2	4	21	1	4	3
501-1000	16	2	2	6	4	1	1
500 or Less	19	4	5	5	2	NA	3
Totals	82	11	11	39	7	7	7
Percents	48.8	45.8	61.1	44.3	46.7	77.8	50.0

Second Mailing, April 19

Over 5000	1	1	NA	0	NA	0	NA
1001-5000	11	4	0	3	3	0	1
501-1000	8	0	2	5	1	0	0
500 or Less	22	3	4	10	1	NA	4
Not Applicable	1	1					
Totals	43	9	6	18	5	0	5
Percents	25.6	37.5	33.3	20.5	33.3	0	35.7

TABLE 1.2--Continued

Third Mailing, May 11

Institution Size	Total	CT	ME	MA	NH	RI	VT
Over 5000	0	0	NA	0	NA	0	NA
1001-5000	4	0	0	4	0	0	0
501-1000	2	0	0	2	0	0	0
500 or Less	6	1	1	3	1	NA	0
Totals	12	1	1	9	1	0	0
Percents	7.1	4.2	5.6	10.2	6.7	0	0

Fourth Mailing, June 1

Over 5000	0	0	NA	0	NA	0	NA
1001-5000	3	1	0	1	1	0	0
501-1000	4	1	0	1	0	1	1
500 or Less	3	0	0	3	0	NA	0
Totals	10	2	0	5	1	1	1
Percents	6.0	8.3	0	5.7	6.7	11.1	7.2

Collecting and Organizing the Findings

Data collection forms were constructed so as to facilitate the classification and reporting of the findings according to (a) the entire New England area, (b) the northern region (Maine, New Hampshire, Vermont), (c) the southern region (Connecticut, Massachusetts, Rhode Island), and (d) each state. On the basis of information provided by the New England Board of Higher Education (122:4-29), the institutions were sub-classified by size of student population, level of degree offerings, and whether or not they were accredited by the New England Association of Schools and Colleges. The results were computed for each class of respondents in relation to total or regional replies. Both the aggregate and categorized responses were analyzed in order to determine whether or not the internal procedures available in each group were meaningful by the standards of Chapter II and also to locate the areas of greatest procedural due process vulnerability in New England's private postsecondary sector.

As one of the means for attempting to discover the quantity of due process that was being provided in each of the various sectors of New England as well as throughout the whole region, the data were summarized both by state and by size of institution. Table 2.1 shows the availability of each component in all the states collectively and individually. In Tables 2.2 and 2.2(a) the information was arranged according to the decreasing extent to which each state's private institutions provided the procedural safeguards and the frequency with which they held each relative position. Following a like format, a summary of due process availability was presented in Table 2.3 to show the differences among institutions in each size group. In Tables 2.4 and 2.4(a) the size categories were ranked and summarized in the same manner as had been done

TABLE 2.1

FREQUENCY OF "YES" RESPONSES BY STATE

All Institutions Reporting		CT		ME		MA		NH		RI		VT	
146		23		18		70		14		8		13	
Question		No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
Notice													
95.2*	1.	22	95.7	17	94.4	68	97.1	12	85.8	8	100.0	12	92.3
84.9	1.(a)	18	78.3	15	83.3	62	88.6	9	64.3	8	100.0	12	92.3
52.7	1.(b)	15	65.2	9	50.0	35	50.0	6	42.9	5	62.5	7	53.8
Hearing													
79.4	2.	16	69.6	14	77.8	59	84.3	9	64.3	7	87.5	11	84.6
68.5	2.(a)1	15	65.2	12	66.7	51	72.9	8	57.1	6	75.0	8	61.5
67.8	2.(a)2	14	60.9	13	72.2	50	71.4	8	57.1	6	75.0	8	61.5
58.2	2.(b)1	12	52.2	12	66.7	43	61.4	5	35.7	5	62.5	8	61.5
41.1	2.(b)2	11	47.8	9	50.0	27	38.6	4	28.6	3	37.5	6	46.2
34.9	2.(b)3	10	43.5	8	44.4	21	30.0	3	21.4	3	37.5	6	46.2
35.6	2.(c)	8	34.8	6	33.3	27	38.6	3	21.4	3	37.5	5	38.5
Record													
64.4	3.	13	56.5	9	50.0	47	67.2	8	57.1	6	75.0	11	84.6
54.8	3.(a)	11	47.8	7	38.9	39	55.7	8	57.1	6	75.0	9	69.2
Other													
53.4	4.	13	56.5	7	38.9	37	52.9	8	57.1	5	62.5	8	61.5

*Percent column for all institutions reporting.

TABLE 2.2

RANKING OF FREQUENCY OF "YES" RESPONSES BY STATE

EXPRESSED AS A PERCENT

		First	Second	Third	Fourth	Fifth	Sixth
1.	Notice	RI 100.0	MA 97.1	CT 95.7	ME 94.4	VT 92.3	NH 85.8
1.(a)	Writing	RI 100.0	VT 92.3	MA 88.6	ME 83.3	CT 78.3	NH 64.3
1.(b)	Reasons	CT 65.2	RI 62.5	VT 53.8	ME 50.0 MA 50.0		NH 42.9
2.	Hearing	RI 87.5	VT 84.6	MA 84.3	ME 77.8	CT 69.6	NH 64.3
2.(a)1	Expertise	RI 75.0	MA 72.9	ME 66.7	CT 65.2	VT 61.5	NH 57.1
2.(a)2	Impartial	RI 75.0	ME 72.2	MA 71.4	VT 61.5	CT 60.9	NH 57.1
2.(b)1	Evidence	ME 66.7	RI 62.5	VT 61.5	MA 61.4	CT 52.2	NH 35.7
2.(b)2	Opposition	ME 50.0	CT 47.8	VT 46.2	MA 38.6	RI 37.5	NH 28.6
2.(b)3	Cross-Exam	VT 46.2	ME 44.4	CT 43.5	RI 37.5	MA 30.0	NH 21.4
2.(c)	Counsel	MA 38.6	VT 38.5	RI 37.5	CT 34.8	ME 33.3	NH 21.4
3.	Record	VT 84.6	RI 75.0	MA 67.2	NH 57.1	CT 56.5	ME 50.0
3.(a)	Evidence	RI 75.0	VT 69.2	NH 57.1	MA 55.7	CT 47.8	ME 38.9
4.	Other	RI 62.5	VT 61.5	NH 57.1	CT 56.5	MA 52.9	ME 38.9

TABLE 2.2(a)

FREQUENCY OF RANK BY STATE

	First	Second	Third	Fourth	Fifth	Sixth
Connecticut	1	1	2	3	6	0
Maine	2	2	1	4	1	3
Massachusetts	1	2	4	4	2	0
New Hampshire	0	0	2	1	0	10
Rhode Island	7	3	1	1	1	0
Vermont	2	5	3	1	2	0

with the states. The procedure for analyzing each of the due process components summarized in the tables was to observe: (1) the propensities of the population as a whole with regard to the principal elements of notice, hearing, and record; (2) tendencies of the ingredients of each element which had been recognized as contributing to its integrity; (3) tendencies of the state propensities to follow aggregate pattern; (4) regional peculiarities, if any; (5) tendencies of the size classes to follow aggregate patterns; (6) any peculiarities common to the size classes; (7) similarities of the pattern of each component with those of the other components; and (8) preliminary generalizations.

Notice

As indicated in Table 2.1, while it was the policy of 95 percent of the private institutions to give prior notice of their adverse contract renewal decisions, the extent of compliance with Chapter II findings declined at an increasing rate with the addition of each notice component.

TABLE 2.3

FREQUENCY OF "YES" RESPONSES BY SIZE OF INSTITUTION

All Institutions Reporting		Over 5000		1001-5000		501-1000		500 or Less	
146		13		53		30		50	
Question		No.	%	No.	%	No.	%	No.	%
Notice									
95.2*	1.	13	100.0	53	100.0	28	93.3	45	90.0
84.9	1.(a)	12	92.3	50	94.3	25	83.3	37	74.0
52.7	1.(b)	4	30.8	23	43.4	18	60.0	32	64.0
Hearing									
79.4	2.	12	92.3	43	81.1	22	73.3	39	78.0
68.5	2.(a)1	10	76.9	39	73.6	20	66.7	31	62.0
67.8	2.(a)2	10	76.9	38	71.7	20	66.7	31	62.0
58.2	2.(b)1	8	61.5	30	56.6	19	63.3	28	56.0
41.1	2.(b)2	7	53.8	15	28.3	16	53.3	22	44.0
34.9	2.(b)3	7	53.8	14	26.4	11	36.7	19	38.0
35.6	2.(c)	4	30.8	21	39.6	9	30.0	18	36.0
Record									
64.4	3.	10	76.9	39	73.6	16	53.3	29	58.0
54.8	3.(a)	8	61.5	35	66.0	12	40.0	25	50.0
Other									
53.4	4.	6	46.2	36	67.9	15	50.0	21	42.0

*Percent column for all institutions reporting.

TABLE 2.4

RANKING OF FREQUENCY OF "YES" RESPONSES BY SIZE OF INSTITUTION

A - Over 5000

C - 501-1000

B - 1001-5000

D - 500 or Less

		First	Second	Third	Fourth
1.	Notice	(A)(B) 100.0		(C) 93.3	(D) 90.0
1.(a)	Writing	(B) 94.3	(A) 92.3	(C) 83.3	(D) 74.0
1.(b)	Reasons	(D) 64.0	(C) 60.0	(B) 43.4	(A) 30.8
2.	Hearing	(A) 92.3	(B) 81.1	(D) 78.0	(C) 73.3
2.(a)1	Expertise	(A) 76.9	(B) 73.6	(C) 66.7	(D) 62.0
2.(a)2	Impartiality	(A) 76.9	(B) 71.7	(C) 66.7	(D) 62.0
2.(b)1	Evidence	(C) 63.3	(A) 61.5	(B) 56.6	(D) 56.0
2.(b)2	Opposition	(A) 53.8	(C) 53.3	(D) 44.0	(B) 28.3
2.(b)3	Cross-Exam	(A) 53.8	(D) 38.0	(C) 36.7	(B) 26.4
2.(c)	Counsel	(B) 39.6	(D) 36.0	(A) 30.8	(C) 30.0
3.	Record	(A) 76.9	(B) 73.6	(D) 58.0	(C) 53.3
3.(a)	Evidence	(B) 66.0	(A) 61.5	(D) 50.0	(C) 40.0
4.	Other	(B) 67.9	(C) 50.0	(A) 46.2	(D) 42.0

TABLE 2.4(a)

FREQUENCY OF RANK BY SIZE OF INSTITUTION

		First	Second	Third	Fourth
Over 5000	(A)	7	3	2	1
1001-5000	(B)	5	4	2	2
501-1000	(C)	1	3	5	4
500 or Less	(D)	1	2	4	6

That tendency prevailed in four of the states, but both Rhode Island and Vermont were equally as willing to give their notice in writing as they were to give notice. Table 2.2 shows that every southern state exceeded the aggregate rate of notice giving, but in the north the propensity was less. The most marked departure was in New Hampshire, which fell 10 percent below the norm.

Viewing the tendencies from the perspective of size of the institutions, as in Table 2.3, the pattern of decline continued with the addition of ingredients. A notice policy existed in all institutions with student populations exceeding 1000 and dropped in each of the two smaller categories. The larger schools also exhibited more of a tendency to commit their decisions to writing, although Table 2.4 shows that the rate of willingness waned slightly among those in the largest category. All size groups were less enthusiastic about giving reasons; but contrary to the pattern of notice and writing, as the institutions got smaller as a class, they expressed a greater willingness to reveal their motivations. Thus the smaller institutions with a lower incidence of writing reported a greater generosity about rationalizing their conduct.

TABLE 3.1

PERCENT OF RESPONDING INSTITUTIONS IN EACH SIZE CLASSIFICATION BY STATE

	CT	ME	MA	NH	RI	VT
Over 5000	17.4	0.0	10.0	0.0	25.0	0.0
1001-5000	30.4	22.2	41.4	35.7	50.0	30.8
501-1000	13.0	22.2	20.0	35.7	25.0	15.4
500 or Less	34.8	55.6	28.6	28.6	0.0	53.8
Not Applicable*	4.4					
Totals	100.0	100.0	100.0	100.0	100.0	100.0

*Nontraditional institution, size classification not applicable.

Converting some of the data from Table 1.1 into percents, Table 3.1 shows that over 50 percent of the colleges and universities in the three southern states were in the two largest categories, whereas in the northern portion the larger schools constituted from 22 to 35 percent with none exceeding 5,000 students. In the north over 50 percent were in the smaller classes. Connecticut and Massachusetts each had slightly less than 50 percent of their total composition made up of small schools, and Rhode Island had 25 percent. Therefore, while size appeared to be the most important factor influencing the availability of notice, there was some apparent regional affect in the quality. Rhode Island, for example, with 50 percent of its respondents in the 1001 to 5000 range, ranked second out of six in reasons while that size group as a whole was third out of four. Maine, with the highest rate of small colleges, ranked fourth among the states, along with Massachusetts, in the same due process factor; the smallest institutions generally were in the top categories. New Hampshire earned an easy last place in all three measures of notice.

Hearing

Consistent with the notice policies, Table 2.1 evidences a continuous deterioration in the quality of institutional review offerings with the addition of each hearing ingredient. Maine had the smallest rate of decline, although its aversion to permitting counsel was exceeded only by that of New Hampshire, its nearest northern neighbor. Maine, the only state which reported no disintergration of the principal hearing ingredients, indicated that its tribunals were more impartial than expert and was the most willing to let its nontenured teachers produce witnesses and face the opposition. Table 2.2 suggests little important regional consistency in the factors of a judicially acceptable hearing except that the southernmost state of Rhode Island placed first three times and the northern state of New Hampshire held fast to its last position. Massachusetts improved its rating when the first element was added but tended to drift farther behind until it had the opportunity to employ some of its lawyers, at which time it assumed the leadership.

According to Table 2.3 there was a continuing diminution in the willingness of all size ranges to provide each of the added factors, except that in the 1001 to 5000 schools there was a significant recovery in their inclination to permit the nonessential of legal counsel. With respect to the receptivity to granting a review, expertise and impartiality of the tribunal, and allowing a teacher to produce evidence and witnesses in his own behalf, Table 2.4 attests to a quality increase with size. There was greater diversity, however, in the areas of confrontation and cross-examination. The largest and second largest schools were farthest apart in permitting these adversarial exercises, and the two smaller groups reversed their positions with regard to the two forms of challenge. Size, then, continued to have an apparent effect on the character of procedural due process, and some regional identity was also evident. However, the lack of uniformity in the more abrasive stages of the hearings suggested that institutional peculiarities other than either dimension or location affected the internal policies on severing probationary teachers from the faculty.

Record

While most respondents reportedly were not opposed to granting opportunities for the development of records, Table 2.1 suggests that except in Vermont and Rhode Island, some of their transcripts would lack utility as institutional armaments against judicial incursion. Although New Hampshire institutions had tended to comport with judicial standards of due process to a lesser extent than did the private tribunals in other states, more of them were confident that the records would support their conclusions. As revealed in Table 2.2, regional affects were mixed. Maine assumed the last position and Connecticut was in fifth place. Massachusetts and New Hampshire exchanged third and fourth place ranks, and Rhode Island and Vermont did likewise with first and second. Tables 2.3 and 2.4 evidence a general reduction in record keeping with diminishing size, but the trend was contradicted in the two smallest groups. With respect to evidence supporting the record, the size affects were less persuasive.

Additional Protections

The data in Tables 2.1 and 2.2 show that over half the institutions believed they had benefits for their probationary teachers which the law community had failed to include among its priorities. The only state with less than 50 percent was Maine, more than one-third of whose institutions expressed a similar view.

Preliminary Observations

Making no attempt at this point to make value distinctions among the factors of procedural due process, the frequency with which some classes of institutions tended to rank in the same or nearly the same relative position gave limited support to the proposition that the smaller institutions as a class tended to be more vulnerable to faculty challenges than did the larger ones. Regional influences were apparent, but the trends were less conclusive. Table 2.2(a) reveals that in the south, although Connecticut was never last, it was almost last more than any other state. Massachusetts was about normative while Rhode Island, with none of the smallest institutions, had the best performance of all states and thus appeared to be the least vulnerable. Regional influences notwithstanding, Vermont, with a high percentage of small schools, ran a close second to Rhode Island, ahead of both Connecticut and Massachusetts. While New Hampshire had a higher percentage of large schools than either Maine or Vermont, it was never first or second. Maine held these positions twice each; but in the three instances where New Hampshire was not in last place, Maine was. Nevertheless, Table 2.4(a) tends to argue in favor of the larger schools. Those exceeding 5000 performed overall slightly ahead of the 1001 to 5000 group; and the below 500, slightly worse than those with student populations of 501 to 1000. The two largest categories were in first and second place an equal number of times, as often as the two smallest groups were in third and fourth place.

Conversely, the two largest classes ranked third and fourth an equal number of times, as often as the two smallest were first and second.

On the basis of these observations, it appeared that no sector of New England's private higher education community which had been analyzed had procedural policies that were unassailable. The quality of due process tended to improve as the institutions got larger, but regional influences appeared to affect its character. The data suggested that Rhode Island and Vermont were the least vulnerable to challenge, while New Hampshire had the greatest exposure. The frequency of all three possible responses to each question was reported in Appendix B on the basis of both size and location.

Since the preliminary analysis had not succeeded in isolating the areas of either the greatest vulnerability or invincibility, a more positive measure of due process was needed as well as a clearer perspective on the durability of the procedures granted at each campus. An attempt was made, therefore, to assess the judicial adequacy of whatever procedural remedies were available to nontenured faculty at each responding institution.

Evaluating the Institutional Policies

In an effort to appraise the quality of their approaches to reviewing nonrenewal decisions, the institutions' policies were evaluated by measuring them against the standards which had been developed in the courts. Full compliance was regarded as meaningful procedural due process, while less than substantial deference to court-sanctioned procedures was given a lower rating. The questionnaire from each campus was valued according to the extent of the institution's adherence to the prerequisites established in Chapter II. Each element that fully complied with the judicial dictate was rated as adequate. If, however, the element was provided but lacked one or more of the essential ingredients, it was rated as inadequate. Otherwise it was noted that the element was not provided. Therefore, for each component of due process the rating could be either adequate (A), inadequate (I), or nonexistent (O). For example, if the institution gave prior written notice of nonrenewal and gave reasons for the action, the notice element was rated as (A). If, however, it gave notice but failed either to put it in writing or to specify the reasons, the notice element was rated as (I). If no prior notice was given, the rating would be (O). The following definitions and methods of determining ratings of components were used to evaluate institutional policies:

Definitions and Determination of Classes

Adequate notice. The teacher was entitled to written notice giving reasons for the decision to terminate prior to the termination date or of the decision not to renew prior to the time for contract renewal.

Question 1. . . . . .Yes
(a) and (b) . . . . .Yes

Inadequate notice. The faculty member was entitled to advance notice; but there was no known requirement of writing or, irrespective of writing, there was no known policy of stating the reasons for the decision.

Question 1. . . . . .Yes
(a) or (b). . . . . .No or uncertain

No prior notice. There was no known institutional policy entitling the teacher to written prior notice setting forth the reasons.

Question 1. . . . . .No or Uncertain

Adequate hearing. On the basis of an alleged wrong, if the teacher made timely request for a review of the decision to terminate or not to renew his or her contract, a hearing was provided. The hearing panel was believed to possess both academic expertise and apparent impartiality toward the charges. In addition, the teacher had the right to produce evidence and witnesses and to confront and cross-examine adverse witnesses.

Question 2. . . . . .Yes

(a) 1 and 2 . . . . .Yes

(b) 1, 2, and 3 . . . . .Yes

Inadequate hearing. A tribunal, on request, was assured; but the hearing panel was not known to possess both academic expertise and an apparent impartiality toward the charges. Alternatively, irrespective of the hearing panel's character, the teacher was lacking in either the right to produce evidence and witnesses or to confront and/or cross-examine adverse witnesses or both.

Question 2. . . . . .Yes

(a) 1 and/or 2. . . . . .No or Uncertain

and/or (b) 1, 2, and/or 3 . . . . .No or Uncertain

No hearing. The teacher was not known to be entitled to a hearing irrespective of whether he or she had made a timely request.

Question 2. . . . . .No or Uncertain

Adequate record. A meaningful opportunity to maintain a record of the proceedings or other events leading to the decision was provided, and the record was expected to show that the decision was based on an appraisal of the evidence.

Question 3. . . . . .Yes

(a) . . . . .Yes

Inadequate record. Opportunity for a record was provided, but the record was not expected to show that the decision was based on an appraisal of the evidence.

Question 3. . . . . .Yes

(a) . . . . .No or Uncertain

No record. No opportunity for the development of a record was known to have been provided.

Question 3. . . . . .No or Uncertain

Combining the Factors of Due Process

The findings of Chapter II suggested that any due process characterization which failed to provide for some form of hearing would be meaningless from a judicial vantage. Similarly, a hearing would be trivial protection without prior notice. (65:303). For procedures to survive court scrutiny, a rudimentary process should have some of the ingredients of all three components (51:944); but at the least it would have to have a judicially cognizable notice and hearing. (105:132). Assuming an institution acted within the scope of its discretionary expertise (78:48) and provided meaningful due process in the procedural sense, it was a premise of this study that the college or university would have then maximized its defenses against faculty challenge. While there would be some institutional vulnerability, if the due process was rudimentary, the college or university would have an opportunity to present an argument for the importance of preserving its autonomy. (25:267). Anything less would leave the institution virtually unprotected if either relevant state action accompanied by the abridgement of a protected property or liberty interest or contractual expectation were successfully asserted. If, however, all three components were present, the hearing was adequate, and either the notice or the record would meet the judicial test, the risk of incursion by the courts should be minimal. In order to assign a value to each questionnaire, the combinations of due process components were grouped accordingly. Within these parameters, no further attempt was made to distinguish among the possible combinations. It was felt that to do so would have been too speculative and that classifying due process values into broad rather than narrowly defined categories would increase the level of confidence for each group.

The left column of Table 4.1 shows the values assigned to the possible due process combinations listed in decreasing order of importance. In the remaining columns the number of respondents who reported a policy of providing those combinations was listed first in the aggregate and then according to size groupings. The same information for the northern and southern regions and for each state has been provided in Appendix B. From the data in that appendix, percentages were calculated in order to determine what proportion of schools in the different size ranges had been assigned each value. On a state basis, Table 4.2 summarizes that information according to the number of respondents and the percent that each number bears to the total for the class represented.

Data Analysis and Interpretation

While it would not be possible to forecast the precise degree of due process vulnerability in New England's private sector, it would seem

TABLE 4.1

EVALUATIONS OF INSTITUTIONAL POLICIES

N = Prior Notice H = Hearing R = Record

A = Adequate I = Inadequate O = Not Provided

Possible Combinations			Size and Number of Institutions with each Rating				
N	H	R	Total	Over 5000	1001-5000	501-1000	500 or Less
			Meaningful				
A	A	A	25	3	9	6	7
A	A	I	1	...	1	...	...
I	A	A	11	2	3	...	6
			Rudimentary				
I	A	I	2	1	...	1	...
A	I	A	23	1	11	3	8
I	I	A	17	2	11	2	2
A	I	I	5	...	1	1	3
I	I	I	4	1	1	1	1
A	A	O	3	...	...	2	1
I	A	O	2	...	...	1	1
A	I	O	6	...	1	1	4
I	I	O	17	2	5	3	7
			Trivial				
O	A	A	...	...	...	...	...
O	A	I	...	...	...	...	...
O	I	A	...	...	...	...	...

TABLE 4.1--Continued

Possible Combinations			Size and Number of Institutions with each Rating				
N	H	R	Total	Over 5000	1001-5000	501-1000	500 or Less
O	A	O	. . .	. . .	. . .	. . .	. . .
O	I	I	. . .	. . .	. . .	. . .	. . .
				Meaningless			
O	I	O	1	. . .	. . .	1	. . .
A	O	A	1	. . .	. . .	. . .	1
I	O	A	3	. . .	1	1	1
O	O	A	. . .	. . .	. . .	. . .	. . .
A	O	I	1	. . .	. . .	1	. . .
I	O	I	1	. . .	1	. . .	. . .
O	O	I	. . .	. . .	. . .	. . .	. . .
A	O	O	3*	. . .	. . .	2	. . .
I	O	O	14	1	8	3	2
O	O	O	6	. . .	. . .	1	5
Totals			146	13	53	30	49

*One institution nontraditional, size not applicable.

reasonable to expect that, other factors equal, the schools rated as "meaningful" would be the most protected. Among all private institutions in New England, Table 4.3 shows that 25.3 percent earned the highest rating. The larger schools tended to fair better than the smaller; although in the northern portion, the 500 or less class earned an immunity

TABLE 4.2

VALUE RATINGS ASSIGNED TO NEW ENGLAND'S PRIVATE INSTITUTIONS BY STATE AND SIZE

	Total		Meaningful		Rudimentary		Trivial		Meaningless	
	No.	%	No.	%	No.	%	No.	%	No.	%
Connecticut	1*								1	
Over 5000	4	100	1	25.0	3	75.0	0	0.0	0	0.0
1001-5000	7	100	2	28.6	2	28.6	0	0.0	3	42.8
501-1000	3	100	1	33.3	1	33.4	0	0.0	1	33.3
500 or Less	8	100	3	37.5	3	37.5	0	0.0	2	25.0
Totals	23	100	7	30.4	9	39.2	0	0.0	7	30.4
Maine										
Over 5000	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
1001-5000	4	100	0	0.0	2	50.0	0	0.0	2	50.0
501-1000	4	100	1	25.0	2	50.0	0	0.0	1	25.0
500 or Less	10	100	4	40.0	5	50.0	0	0.0	1	10.0
Totals	18	100	5	27.8	9	50.0	0	0.0	4	22.2
Massachusetts										
Over 5000	7	100	3	42.9	3	42.9	0	0.0	1	14.2
1001-5000	29	100	9	31.0	18	62.1	0	0.0	2	6.9
501-1000	14	100	2	14.3	7	50.0	0	0.0	5	35.7
500 or Less	20	100	1	5.0	16	80.0	0	0.0	3	15.0
Totals	70	100	15	21.4	44	62.9	0	0.0	11	15.7

TABLE 4.2--Continued

	Total		Meaningful		Rudimentary		Trivial		Meaningless	
	No.	%	No.	%	No.	%	No.	%	No.	%
New Hampshire										
Over 5000	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
1001-5000	5	100	0	0.0	3	60.0	0	0.0	2	40.0
501-1000	5	100	1	20.0	3	60.0	0	0.0	1	20.0
500 or Less	4	100	1	25.0	1	25.0	0	0.0	2	50.0
Totals	14	100	2	14.3	7	50.0	0	0.0	5	35.7
Rhode Island										
Over 5000	2	100	1	50.0	1	50.0	0	0.0	0	0.0
1001-5000	4	100	1	25.0	3	75.0	0	0.0	0	0.0
501-1000	2	100	0	0.0	1	50.0	0	0.0	1	50.0
500 or Less	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Totals	8	100	2	25.0	5	62.5	0	0.0	1	12.5
Vermont										
Over 5000	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
1001-5000	4	100	1	25.0	2	50.0	0	0.0	1	25.0
501-1000	2	100	1	50.0	1	50.0	0	0.0	0	0.0
500 or Less	7	100	4	57.1	2	28.6	0	0.0	1	14.3
Totals	13	100	6	46.1	5	38.5	0	0.0	2	15.4
Grand Totals	146	100	37	25.3	79	54.1	0	0.0	30	20.6

*Nontraditional institution, size not applicable.

TABLE 4.3

INSTITUTIONAL POLICIES RATED "MEANINGFUL"

	Total		Over 5000		1001-5000		501-1000		500 or Less	
	No.	%	No.	%	No.	%	No.	%	No.	%
Northern Region										
Maine	5	27.8	NA	NA	0	0.0	1	25.0	4	40.0
New Hampshire	2	14.3	NA	NA	0	0.0	1	20.0	1	25.0
Vermont	6	46.1	NA	NA	1	25.0	1	50.0	4	57.1
Totals	13	28.9	NA	NA	1	7.7	3	27.3	9	42.9
Southern Region										
Connecticut	7	30.4	1	25.0	2	28.6	1	33.3	3	37.5
Massachusetts	15	21.4	3	42.9	9	31.0	2	14.3	1	5.0
Rhode Island	2	25.0	1	50.0	1	25.0	0	0.0	NA	NA
Totals	24	23.8	5	38.5	12	30.0	3	15.8	4	14.3
Grand Totals	37	25.3	5	38.5	13	24.5	6	20.0	13	26.5

rating of 42.9 percent, the highest of any class. The second highest evaluation went to the largest universities in the south. In the south there was a gradual decline in the quality of due process policies with diminishing size, but in the north there was a marked reversal. The poorest records were in Maine's and New Hampshire's largest institutions, none of which earned the highest evaluations.

In the rudimentary group, according to Table 4.4, the southern

TABLE 4.4

INSTITUTIONAL POLICIES RATED "RUDIMENTARY"

	Total		Over 5000		1001-5000		501-1000		500 or Less	
	No.	%	No.	%	No.	%	No.	%	No.	%
Northern Region										
Maine	9	50.0	NA	NA	2	50.0	2	50.0	5	50.0
New Hampshire	7	50.0	NA	NA	3	60.0	3	60.0	1	25.0
Vermont	5	38.5	NA	NA	2	50.0	1	50.0	2	28.6
Totals	21	46.7	NA	NA	7	53.8	6	54.5	8	38.1
Southern Region										
Connecticut	9	39.2	3	75.0	2	28.6	1	33.4	3	37.5
Massachusetts	44	62.9	3	42.9	18	62.1	7	50.0	16	80.0
Rhode Island	5	62.5	1	50.0	3	75.0	1	50.0	NA	NA
Totals	58	57.4	7	53.8	23	57.5	9	47.4	19	67.9
Grand Totals	79	54.1	7	53.8	30	56.6	15	50.0	27	55.1

institutions' policies were superior to those in the north in two of the three size ranges in which comparisons were possible. The larger schools rated slightly better than the smaller ones overall; but in the southern region the colleges with fewer than 500 students were more than 10 points higher than any other class represented in Table 4.4. As the chart indicates, the imbalance could be attributed to Massachusetts, in which the trend was in contrast to the rest of New England and where the 500 or less category had a higher rating than did any other single class. Earning the next highest ratings were both Connecticut schools of greater than 5000 student enrollment and Rhode Island's 1001 to 5000 class. The highest three evaluations, then, were in the south; and two of them were earned by schools in the upper half of the enrollment structure. The lowest were in New Hampshire's smallest schools and in Connecticut's 1001 to 5000 class.

A Measure of Adequacy in New England

If maximum protection was the objective of New England's private institutions as they designed their nonrenewal policies, the survey revealed that only 25 percent had achieved it. On the other hand, the data could be interpreted as giving evidence that a substantial portion of the colleges and universities had adopted a stance similar to that expressed by Aiken. (supra 9). He had suggested that a courageous administration might choose to assume a measure of liability exposure when to do otherwise would compromise the institution's educational objectives. (58:132). Frakt had found that the courts tended to respect institutional termination decisions when they were based on matters which were within the discretionary expertise of the administration. (78:52-53). The Fifth Circuit Court in Sindermann admonished teachers to exploit their internal remedies (51:943), and Brown assessed the courts' attitudes on administrative discretion as liberal. (65:305). Even the American Association of University Professors acknowledged that managerial latitude was desirable. (115:10).

Since the literature had revealed a judicial deference to private autonomy, especially in regard to their personnel policies, a supportable argument could be asserted that even rudimentary procedures would

TABLE 4.5

INSTITUTIONAL POLICIES RATED "ADEQUATE" (MEANINGFUL OR RUDIMENTARY)

	Total		Over 5000		1001-5000		501-1000		500 or Less	
	No.	%	No.	%	No.	%	No.	%	No.	%
Northern Region										
Maine	14	77.8	NA	NA	2	50.0	3	75.0	9	90.0
New Hampshire	9	64.3	NA	NA	3	60.0	4	80.0	2	50.0
Vermont	11	84.6	NA	NA	3	75.0	2	100.0	6	85.7
Totals	34	75.6	NA	NA	8	61.5	9	81.8	17	81.0
Southern Region										
Connecticut	16	69.6	4	100.0	4	57.2	2	66.7	6	75.0
Massachusetts	59	84.3	6	85.8	27	93.1	9	64.3	17	85.0
Rhode Island	7	87.5	2	100.0	4	100.0	1	50.0	NA	NA
Totals	82	81.2	12	92.3	35	87.5	12	63.2	23	82.2
Grand Totals	116	79.5	12	92.3	43	81.1	21	70.0	40	81.6

adequately endure most types of probationary faculty challenges. If so, Table 4.5 reveals that nearly 80 percent of the studied postsecondary institutions had adequate protection. Using the combined effect of "meaningful" and "rudimentary" evaluations as a test of adequacy, Maine's largest and New Hampshire's and Rhode Island's smallest institutions tended to have the fewest adequate policies. The highest evaluation went to Connecticut's largest, Rhode Island's two largest, and Vermont's inter-

TABLE 4.6

INSTITUTIONAL POLICIES RATED "MEANINGLESS"

	Total		Over 5000		1001-5000		501-1000		500 or Less	
	No.	%	No.	%	No.	%	No.	%	No.	%
Northern Region										
Maine	4	22.2	NA	NA	2	50.0	1	25.0	1	10.0
New Hampshire	5	35.7	NA	NA	2	40.0	1	20.0	2	50.0
Vermont	2	15.4	NA	NA	1	25.0	0	0.0	1	14.3
Totals	11	24.4	NA	NA	5	38.5	2	18.2	4	19.0
Southern Region	1*									
Connecticut	6	30.4	0	0.0	3	42.8	1	33.3	2	25.0
Massachusetts	11	15.7	1	14.2	2	6.9	5	35.7	3	15.0
Rhode Island	1	12.5	0	0.0	0	0.0	1	50.0	NA	NA
Totals	19	18.8	1	7.7	5	12.5	7	36.8	5	17.8
Grand Totals	30	20.5	1	7.7	10	18.9	9	30.0	9	18.4

*Nontraditional institution, size not applicable.

mediate institutions.

If the courts would agree with the designation of "meaningless," Table 4.6 could be regarded as a vulnerability index. By that measure, the greatest rates of concentration of vulnerable institutions were in Maine's private colleges and universities with student enrollments of 1001 to 5000, in New Hampshire's schools of 500 or less, and in Rhode

Island's institutions of 501 to 1000, the smallest class in that state.

Having at least partly achieved one of the objectives of the study, that is, identifying areas of greatest and least vulnerability or invincibility in the investigated region, the various sectors were ranked according to their decreasing rate of defensible policies. The purpose was to facilitate the identification of strong and weak areas and to make comparisons among groups with similar exposure to legal attack.

Tenability Ranking of Institutional Policies

The classes of New England institutions which had the highest percentages of maximum exposure to judicial review were located in Maine, New Hampshire, and Rhode Island. As illustrated by the rank ordering of Table 5.1, Massachusetts was the only state which had schools in the over 5000 category whose policies this investigation has suggested were most vulnerable to nontenured faculty challenges. Of course, there were no private postsecondary institutions at all in that size category in either Maine or New Hampshire. In the former, the high vulnerability schools were among the largest operating within its borders. In the other two cases where 50 percent of the class had "meaningless" ratings, however, the institutions represented the smallest in those states. Aside from the low incidence of the largest universities having high vulnerability, there were no significant size trends nor any distinguishable regional patterns.

Among the lowest exposure schools exhibited in Table 5.2, the most favorable ranking was earned by the smallest schools in the northern state of Vermont. The only institutions exceeding a student enrollment of 5000 which had a rate of "meaningful" evaluations as low as 25 percent were located in Connecticut. The 1001 to 5000 class schools with the same

TABLE 5.1

RATE OF HIGHEST VULNERABILITY

Institutional Policies Valued as "Meaningless" Expressed as a Percent of the Class Represented

State	Size	Percent	State	Size	Percent
1. ME	1001 - 5000	50.0	ME	501 - 1000	25.0
NH	500 or Less	50.0	VT	1001 - 5000	25.0
RI	501 - 1000	50.0	7. NH	501 - 1000	20.0
2. CT	1001 - 5000	42.8	8. MA	500 or Less	15.0
3. NH	1001 - 5000	40.0	9. VT	500 or Less	14.3
4. MA	501 - 1000	35.7	10. MA	Over 5000	14.2
5. CT	501 - 1000	33.3	11. ME	500 or Less	10.0
6. CT	500 or Less	25.0	12. MA	1001 - 5000	6.9

ratings were located in Rhode Island and Vermont. All other groups with the same or lower rate of inviolability were made up of colleges of 1000 or fewer students. In Massachusetts the two clusters of small institutions attained the lowest rating of impregnability.

In more than two-thirds of the institutions analyzed, more than two-thirds of the respondents had policies which could be at least described as "adequate." As Table 5.3 signifies, no group had less than 50 percent representation. The lowest delegations reported were the same three in which their other halves were revealed by Table 5.1 as being the most susceptible to judicially supervised confrontation. In those three groups, then, half the campus policies were "rudimentary" or higher, and half were considered to be "meaningless" as expressions of procedural

TABLE 5.2

RATE OF LOWEST VULNERABILITY

Institutional Policies Valued as "Meaningful" Expressed as a Percent of the Class Represented

State	Size	Percent	State	Size	Percent
1. VT	500 or Less	57.1	9. CT	Over 5000	25.0
2. RI	Over 5000	50.0	ME	501 - 1000	25.0
VT	501 - 1000	50.0	NH	500 or Less	25.0
3. MA	Over 5000	42.9	RI	1001 - 5000	25.0
4. ME	500 or Less	40.0	VT	1001 - 5000	25.0
5. CT	500 or Less	37.5	10. NH	501 - 1000	20.0
6. CT	501 - 1000	33.3	11. MA	501 - 1000	14.3
7. MA	1001 - 5000	31.0	12. MA	500 or Less	5.0
8. CT	1001 - 5000	28.6			

due process. All three of those states and all three size categories had representation in the top 50 percent of the sectors reported in Table 5.3; that is, ratings of 80 percent or better. Rhode Island's other two groups of schools achieved 100 percent adequacy ratings.

Summarizing the data from Tables 5.1 through 5.3, Table 5.4 was intended to expose the frequency with which each state or size group was included with the first half of all the colleges and universities listed in each of the value ranking tables. By that measure, geography seemed to play a small, although not a negligible, part. Connecticut's policies appeared to be the least affected with regional identity, reflecting a divergent due process posture. The range of vulnerability reflected in the

TABLE 5.3

RATE OF ADEQUATE PROTECTION

Institutional Policies Valued as "Meaningful" or "Rudimentary" Expressed as a Percent of the Class Represented

State	Size	Percent	State	Size	Percent
1. CT	Over 5000	100.0	8. CT	500 or Less	75.0
RI	Over 5000	100.0	ME	501 - 1000	75.0
RI	1001 - 5000	100.0	VT	1001 - 5000	75.0
VT	501 - 1000	100.0	9. CT	501 - 1000	66.7
2. MA	1001 - 5000	93.1	10. MA	501 - 1000	64.3
3. ME	500 or Less	90.0	11. NH	1001 - 5000	60.0
4. MA	Over 5000	85.8	12. CT	1001 - 5000	57.2
5. VT	500 or Less	85.7	13. ME	1001 - 5000	50.0
6. MA	500 or Less	85.0	NH	500 or Less	50.0
7. NH	501 - 1000	80.0	RI	501 - 1000	50.0

policies of Maine's private sector was evenly divided; and in Massachusetts, they tended toward judicially approved procedures. New Hampshire's institutions were the most protective of their autonomy; and in Vermont, they were the least. As a product of size, Table 5.4 shows that the largest colleges and universities had the most generous policies; but the two intermediate groups were alike in being nearly evenly divided, tending toward vulnerability. The smallest had a propensity toward court-like tribunals.

The findings of the tenability ranking generally concurred with the preliminary observations. However, generalizations about the influence of size or region as factors of procedural due process became more

TABLE 5.4

FREQUENCY WITH WHICH EACH INSTITUTION GROUP WAS INCLUDED AMONG THE HIGHEST 50 PERCENT LISTED IN EACH VULNERABILITY CATEGORY BY STATE AND SIZE

	Vulnerability Rating		
	Highest	Adequate	Lowest
State			
Connecticut	2	1	3
Maine	1	1	1
Massachusetts	1	3	2
New Hampshire	2	1	0
Rhode Island	1	2	1
Vermont	0	2	2
Size of Institution			
Over 5000	0	3	2
1001-5000	3	2	2
501-1000	3	2	2
500 or Less	1	3	3

tenuous. The added analysis tended to give more evidence of diversity than unanimity among New England's private colleges and universities. There were high concentrations of vulnerability among the largest schools in the north and the next to the smallest schools in the south. The largest southern institutions had nearly all eliminated the greatest exposure areas, and the remaining sectors were about uniform. However, the most relevant distinctions seemed to be between the classes assigned a "meaningful" rating and those evaluated as "adequate."

The largest institutions did have the best overall adequacy ratings as the preliminary observations had suggested, but the intermediate sizes were out performed by the smallest schools. The southern states' adequacy performance averaged higher than that of the north; but under the severest test, the north rated higher. Connecticut tended to be below the other two southern states but could be expected to fair better than either of them under closer judicial scrutiny. Rhode Island held its overall lead but fell below Connecticut, Maine, and Vermont in having the highest rate of "meaningful" policies affecting probationary faculty. New Hampshire continued to be the lowest of all states with the "meaningful" rating and, likewise, was below average in overall adequacy.

The two additional variables which were observable in the study were the level of degree offerings and the type of accreditation. Table 5.5 shows the distribution according to the presence or absence of accreditation by the New England Association of Schools and Colleges. Information on the accreditation and type of degrees was obtained from the New England Board of Higher Education. (122:4-29).

The schools which offered graduate degrees had a lower rate of "meaningful" evaluations than did those in the undergraduate only group but were superior in the "rudimentary" rank. Combining the two highest ratings as a measure of adequacy, the institutions offering postbachelor's credentials were superior. Accredited institutions were approximately equal or better in all evaluations and had a higher rate of adequacy by 11 percent.

The research had identified the concentrations of due process

TABLE 5.5

VALUE RATINGS ASSIGNED TO NEW ENGLAND'S PRIVATE INSTITUTIONS BY HIGHEST DEGREE OFFERED

	Total		Meaningful		Rudimentary		Trivial		Meaningless	
	No.	%	No.	%	No.	%	No.	%	No.	%
Graduate	69	100	14	20.3	43	62.3	0	0.0	12	17.4
Undergraduate	75	100	23	30.7	35	46.7	0	0.0	17	22.6
Other	2	100	0	0.0	1	50.0	0	0.0	1	50.0
Totals	146	100	37	25.3	79	54.1	0	0.0	30	20.6

TABLE 5.6

VALUE RATINGS ASSIGNED TO NEW ENGLAND'S PRIVATE INSTITUTIONS BY PRESENCE OR ABSENCE OF REGIONAL ACCREDITATION

	Total		Meaningful		Rudimentary		Trivial		Meaningless	
	No.	%	No.	%	No.	%	No.	%	No.	%
Accredited	126	100	34	27.0	68	54.0	0	0.0	24	19.0
Nonaccredited	20	100	3	15.0	11	55.0	0	0.0	6	30.0
Totals	146	100	37	25.3	79	54.1	0	0.0	30	20.6

among New England's private postsecondary institutions. The findings, however, tended to suggest that while internal policy makers had paid some homage to the practices of their colleagues, they seemed to resolve most of their nontenured faculty questions on other bases. Further analysis inquired into the validity of these observations.

Statistical Procedures

The survey was conducted in order to determine the character of due process existing in the private postsecondary sector of New England. Cross-classification by state and by size of institution made it possible to isolate the areas in which there were qualitative differences in the available procedures. An analysis of the survey results had not revealed whether these variances were attributable to the peculiarities of the institutions studied or to external factors such as size or location. While the nature of the procedures in each of the classes had been identified, generalizations had not been warranted. Thus it could not be concluded that as institutions got larger, they tended to design procedures more closely resembling the judiciary's; and that because institutions were located in northern New England, their tribunals were more likely to be deficient than those of their southern counterparts; or that level of degree offered or accreditation affected the character of due process. Since the findings had not produced definitive statements about the effects of external influences on internal policy making, there was little basis for expecting causal relationships between the due process evaluations and those influences. In order to test these observations statistically, it was hypothesized that:

There is no significant relationship between the character of institutional due process and the (1) region in which the college or university is located, (2) size of student population, (3) level of highest degree offered, or (4) accreditation by the New England Association of Schools and Colleges.

For purposes of testing hypotheses about relationships in an entire frequency distribution, Lynch and Huntsberger suggested that the chi-square statistic could be used for data with categorical descriptions. (8:203-5). They asserted further that the chi-square test could determine whether the variables of the behavior under study were independent of the conditions under which the data were obtained. (8:207). The variable conditions which were observable in the New England survey included the size and location of the institutions, the types of degrees offered, and the type of accreditation. Since the differences in the rating of due process among institutions in different locations and of different sizes had been observed, it was decided to attempt to determine whether those differences were significant or if, instead, they could be attributed to chance. Isaac and Michael presented a format for setting up the chi-square analysis as a test of statistical significance among responses in different classes distributed among several groups. (5:138). They explained that the rejection of a null hypothesis regarding relationships would lead to the conclusion that differences in results were statistically significant and, therefore, due to causes other than chance. Failure to reject the null hypothesis would increase the expectation that differences were due to chance factors rather than to the variables tested. (5:142).

In order to employ their approach it was necessary to establish some rational basis for deriving theoretical frequencies which might be due to chance; that is, expected frequencies which could be compared with actually observed frequencies. (5:138-39). Concurring in the applicability of the chi-square analysis and following a nearly identical format for setting up the statistical test, Clover and Balsley presented a method for deriving the theoretical distributions from observed data. (3:479). For purposes of arriving at theoretical distributions for the data obtained in the New England survey, Table 6.1 was constructed, according to Clover and Balsley's model, as a prerequisite to measuring the influence of institutional location.

The "Proportions of Totals" column was derived by dividing each of the total responses for the states by total of all responses. The resulting proportion for each state was then multiplied by the total frequency for each due process value rating in each cell in order to produce the theoretical frequency for each value in each state. Consistent with the requirements of a chi-square distribution (5:135), the sums of the theoretical frequencies were equal to those which had been actually observed. Following the same format, Table 6.2 was designed to determine theoretical frequencies for each of the institution size classes studied. Isaac and Michael had stated, however, and Clover and Balsley agreed that a requirement for the effective implementation of the chi-square was that there should be five or more observations in each theoretical class. (5:135, 3:183). Since ten of the theoretical observations derived in Table 6.1 were less than the required theoretical frequency of five and two were below the minimum in 6.2, it was necessary to combine frequencies.

One approach was to reclassify the geographical factors into northern and southern regions and the size factors by combining the two largest categories. The other was to retain the state and size classifications intact but to regroup the frequencies according to the number of

DERIVATION OF THEORETICAL DISTRIBUTION FOR CHI-SQUARE TEST

TABLE 6.1

THREE DUE PROCESS VALUES DISTRIBUTED AMONG SIX NEW ENGLAND STATES

	Observed Frequencies					Theoretical Frequencies			
	Mean-ingless	Rudi-mentary	Mean-ingful	Totals	Proportions of Totals	Mean-ingless	Rudi-mentary	Mean-ingful	Totals
Connecticut	7	9	7	23	.1575	4.73	12.44	5.83	23.00
Maine	4	9	5	18	.1233	3.70	9.74	4.56	18.00
Massachusetts	11	44	15	70	.4795	14.39	37.88	17.74	70.01
New Hampshire	5	7	2	14	.0959	2.88	7.58	3.55	14.01
Rhode Island	1	5	2	8	.0548	1.64	4.33	2.03	8.00
Vermont	2	5	6	13	.0890	2.66	7.03	3.29	12.98
Totals	30	79	37	146	1.0000	30.00	79.00	37.00	146.00

DERIVATION OF THEORETICAL DISTRIBUTION FOR CHI-SQUARE TEST

TABLE 6.2

THREE DUE PROCESS VALUES DISTRIBUTED AMONG FOUR SIZE CLASSES

	Observed Frequencies					Theoretical Frequencies			
	Meaningless	Rudimentary	Meaningful	Totals	Proportions of Totals	Meaningless	Rudimentary	Meaningful	Totals
Over 5000	1	7	5	13	.0897	2.60	7.09	3.32	13.01
1001-5000	10	30	13	53	.3655	10.60	28.87	13.52	52.99
501-1000	9	15	6	30	.2069	6.00	16.35	7.66	30.01
500 or Less	9	27	13	49	.3379	9.80	26.69	12.50	48.99
Totals	29*	79	37	145	1.0000	29.00	79.00	37.00	145.00

*One institution was not included because size was not applicable.

institutions in each state and in each size classification which had been assigned an "adequate" evaluation. The rating of "adequate" had been derived in Table 4.5 by combining "meaningful" and "rudimentary" evaluations. Tables 6.1(a) and 6.2(a) were constructed in order to retain individual due process ratings, while 6.3 and 6.4 restored the individual state and size ratings.

In Table 6.1(a) the groups were reclassified by northern and southern regions, resulting in frequencies for each theoretical cell which exceeded the required minimum. Table 6.2(a) accomplished a like result by combining all frequencies for each institution of 1000 or more students. In order to derive the theoretical distribution of the "adequate" rating in Table 6.3, the "Proportions" column was calculated by dividing the total number of respondents in each state by the total respondents in New England as presented in Table 4.2. In Table 6.4 the "Proportions" column was calculated by dividing total respondents in each size group by total respondents in New England as presented in Table 4.2, excluding from the total the respondent for which size was not applicable. The needed theoretical frequencies, therefore, had been derived in two ways and both regional and size influences were preserved.

In Tables 6.5 and 6.6 the same format was employed to obtain theoretical distributions for the level of highest degree offered and whether accredited by the New England Association of Schools and Colleges. Since one of the theoretical frequencies in Table 6.6 was less than five, the "rudimentary" and "meaningful" ratings were combined to arrive at an "adequate" evaluation, exhibited in Table 6.7. The "Proportions" column was derived by dividing the total number of accredited institutions and the total number of nonaccredited institutions by the total number of institutions, as exhibited in Table 5.6.

DERIVATION OF THEORETICAL DISTRIBUTION FOR CHI-SQUARE TEST

TABLE 6.1(a)

THREE DUE PROCESS VALUES DISTRIBUTED BETWEEN TWO REGIONS

	Meaningless	Rudimentary	Meaningful	Totals	Proportions of Totals	Meaningless	Rudimentary	Meaningful	Totals
Northern	11	21	13	45	.3082	9.25	24.35	11.40	45.00
Southern	19	58	24	101	.6918	20.75	54.65	25.60	101.00
Totals	30	79	37	146	1.0000	30.00	79.00	37.00	146.00

TABLE 6.2(a)

THREE DUE PROCESS VALUES DISTRIBUTED AMONG THREE SIZE CLASSES

Over 1000	11	37	18	66	.4552	13.20	35.96	16.84	66.00
501-1000	9	15	6	30	.2069	6.00	16.35	7.66	30.01
500 or Less	9	27	13	49	.3379	9.80	26.69	12.50	48.99
Totals	29	79	37	145	1.0000	29.00	79.00	37.00	145.00

DERIVATION OF THEORETICAL DISTRIBUTION FOR CHI-SQUARE TEST

TABLE 6.3

DUE PROCESS VALUE OF "ADEQUATE" DISTRIBUTED AMONG ALL SIX NEW ENGLAND STATES

	Observed	Proportions	Theoretical
CT	16	.158	18.33
ME	14	.123	14.27
MA	59	.479	55.56
NH	9	.096	11.14
RI	7	.055	6.38
VT	11	.089	10.32
Totals	116	1.000	116.00

TABLE 6.4

DUE PROCESS VALUE OF "ADEQUATE" DISTRIBUTED AMONG FOUR SIZE CLASSES

	Observed	Proportions	Theoretical
Over 5000	12	.090	10.44
1001-5000	43	.365	42.34
501-1000	21	.207	24.01
500 or Less	40	.338	39.21
Totals	116	1.000	116.00

DERIVATION OF THEORETICAL DISTRIBUTION FOR CHI-SQUARE

TABLE 6.5

THREE DUE PROCESS VALUES DISTRIBUTED BETWEEN TWO LEVELS OF DEGREES OFFERED

	Meaningless	Rudimentary	Meaningful	Totals	Proportions of Totals	Meaningless	Rudimentary	Meaningful	Totals
Graduate	12	43	14	69	.4792	13.90	37.38	17.73	69.01
Undergraduate	17	35	23	75	.5208	15.10	40.62	19.27	74.99
Totals	29	78	37	144	1.0000	29.00	78.00	37.00	144.00

TABLE 6.6

THREE DUE PROCESS VALUES DISTRIBUTED BETWEEN ACCREDITED AND NONACCREDITED INSTITUTIONS

Accredited	24	68	34	126	.8630	25.89	68.18	31.93	126.00
Nonaccredited	6	11	3	20	.1370	4.11	10.82	5.07	20.00
Totals	30	79	37	146	1.0000	30.00	79.00	37.00	146.00

DERIVATION OF THEORETICAL DISTRIBUTION FOR CHI-SQUARE TEST

TABLE 6.7

DUE PROCESS VALUE OF "ADEQUATE" DISTRIBUTED BETWEEN REGIONALLY ACCREDITED AND NONACCREDITED INSTITUTIONS

	Observed	Proportions	Theoretical
Accredited	102	.86301	100.11
Nonaccredited	14	.13699	15.89
Totals	116	1.00000	116.00

Having derived theoretical frequencies for all the variables observed, the next step was to compute the values of the chi-square.

Testing the Significance of Relationships

The formulas presented by Clover and Balsley (3:178), Isaac and Michael (5:138), and Lynch and Huntsberger (8:205) provided that the sum of the observed minus the theoretical frequencies squared and divided by the theoretical frequencies produced the value of chi-square. If the computed chi-square value exceeded the theoretical value, obtained from a table of chi-square values at selected levels of significance (3:365), the null hypothesis could be rejected. (3:181). If the computed value was smaller and the null hypothesis could not be rejected, the observed differences would not be statistically significant and would probably be due to chance. (5:139).

Table 7.1 was constructed to test the hypothesis that there was no relationship between due process ratings and whether institutions were located in the northern or southern region of New England. The symbols

TABLE 7.1

CALCULATION OF THE VALUE OF CHI-SQUARE BASED ON THE DISTRIBUTION OF DUE PROCESS IN TWO REGIONS

X	f	f'	$(f - f')$	$(f - f')^2$	$\frac{(f - f')^2}{f'}$
Meaningless					
Northern	11	9.25	1.75	3.0625	.33108
Southern	19	20.75	1.75	3.0625	.14759
Rudimentary					
Northern	21	24.35	3.35	11.2225	.46088
Southern	58	54.65	3.35	11.2225	.20535
Meaningful					
Northern	13	11.40	1.60	2.5600	.22456
Southern	24	25.60	1.60	2.5600	.10000
Totals	146	146.00			$X^2 = 1.46946$

used in Table 7.1 and succeeding tables presenting a calculation of the value of chi-square were those employed by Clover and Balsley; namely, "f = observed frequencies in each class" and "f' = theoretical frequencies in each class." (3:178). The values from the table of theoretical chi-square distribution (3:365) were:

$X^2_{.99}$ at 2 d.f. = 9.210

$X^2_{.95}$ at 2 d.f. = 5.991

$X^2_{.90}$ at 2 d.f. = 4.605

Since the computed value of 1.46946 from Table 7.1 was less than the tabular values, the hypothesis could not be rejected and the differences were, therefore, probably due to chance factors.

TABLE 7.2

CALCULATION OF THE VALUE OF CHI-SQUARE BASED ON THE DISTRIBUTION OF DUE PROCESS IN THREE SIZE CLASSES

X	f	f'	(f - f')	$(f - f')^2$	$\frac{(f - f')^2}{f'}$
Meaningless					
Over 1000	11	13.20	2.20	4.8400	.36667
501-1000	9	6.00	3.00	9.0000	1.50000
500 or Less	9	9.80	.80	.6400	.06531
Rudimentary					
Over 1000	37	35.96	1.04	1.0816	.03008
501-1000	15	16.35	1.35	1.8225	.11147
500 or Less	27	26.69	.31	.0961	.00360
Meaningful					
Over 1000	18	16.84	1.16	1.3456	.07990
501-1000	6	7.66	1.66	2.7556	.35974
500 or Less	13	12.50	.50	.2500	.02000
Totals	145	145.00			$X^2 = 2.53677$

Table 7.2 represents a test of the hypothesis that there was no relationship between due process ratings and whether institutional student enrollments were over 1000, 501 to 1000, or 500 or less. The tabular values were found to be:

$X^2_{.99}$ at 4 d.f. = 13.277

$X^2_{.95}$ at 4 d.f. = 9.488

$X^2_{.90}$ at 4 d.f. = 7.779

TABLE 7.3

CALCULATION OF THE VALUE OF CHI-SQUARE BASED ON THE DISTRIBUTION OF "ADEQUATE" DUE PROCESS IN SIX NEW ENGLAND STATES

X	f	f'	(f - f')	$(f - f')^2$	$\frac{(f - f')^2}{f'}$
Connecticut	16	18.33	2.33	5.4289	.29618
Maine	14	14.27	.27	.0729	.00511
Massachusetts	59	55.56	3.44	11.8336	.21299
New Hampshire	9	11.14	2.14	4.5796	.41110
Rhode Island	7	6.38	.62	.3844	.06025
Vermont	11	10.32	.68	.4624	.04481
Totals	116	116.00			$X^2 = 1.03044$

In Table 7.2 the computed value of 2.53677 was less than the tabular values, so the hypothesis could not be rejected.

The purpose of Table 7.3 was to test the hypothesis that there was no relationship between due process ratings of "adequate" and the New England states in which the institutions were located. The theoretical values from the table were reported as:

$$X^2_{.99} \text{ at 5 d.f.} = 15.086$$

$$X^2_{.95} \text{ at 5 d.f.} = 11.070$$

$$X^2_{.90} \text{ at 5 d.f.} = 9.236$$

Because the Table 7.3's computed value of 1.03044 was less than the theoretical values at the different levels of significance, the hypothesis could not be rejected and causes other than state of location were seen as likely to account for the differences.

TABLE 7.4

CALCULATION OF THE VALUE OF CHI-SQUARE BASED ON THE DISTRIBUTION OF DUE PROCESS IN FOUR SIZE CLASSES

X	f	f'	(f - f')	$(f - f')^2$	$\frac{(f - f')^2}{f'}$
Over 5000	12	10.44	1.56	2.4336	.23310
1001-5000	43	42.34	.66	.4356	.01029
501-1000	21	24.01	3.01	9.0601	.37735
500 or Less	40	39.21	.79	.6241	.01592
Totals	116	116.00			X^2 = .63666

Table 7.4 was designed to test the hypothesis that there was no relationship between due process ratings of "adequate" and whether institutional student enrollments were over 5000, 1001 to 5000, 501 to 1000, or 500 or less. The tabular values were:

$X^2_{.99}$ at 3 d.f. = 11.345

$X^2_{.95}$ at 3 d.f. = 7.815

$X^2_{.90}$ at 3 d.f. = 6.251

In Table 7.4, the computed value of .63666 was less than the theoretical values, thus preventing a rejection of the hypothesis and failing to account for differences due to institution size.

The hypothesis that there was no relationship between due process ratings and whether the highest degree offered was graduate or undergraduate was tested in Table 7.5. The theoretical values were:

$X^2_{.99}$ at 2 d.f. = 9.210

$X^2_{.95}$ at 2 d.f. = 5.991

$X^2_{.90}$ at 2 d.f. = 4.605

TABLE 7.5

CALCULATION OF THE VALUE OF CHI-SQUARE BASED ON THE DISTRIBUTION OF DUE PROCESS ACCORDING TO HIGHEST DEGREE OFFERED

X	f	f'	(f - f')	$(f - f')^2$	$\frac{(f - f')^2}{f'}$
Meaningless					
Graduate	12	13.90	1.90	3.61	.25971
Undergraduate	17	15.10	1.90	3.61	.23907
Rudimentary					
Graduate	43	37.38	5.62	31.58	.84495
Undergraduate	35	40.62	5.62	31.58	.77756
Meaningful					
Graduate	14	17.73	3.73	13.91	.78471
Undergraduate	23	19.27	3.73	13.91	.72200
Totals	144	144.00			$X^2 = 3.62800$

The computed value of 3.628 in Table 7.5 being lower, the hypothesis could not be rejected.

Chance appeared to continue to be a likely factor accounting for the differences in due process distributions as revealed in Table 7.6, which was based on regional accreditation. The computed value of .26048 was less than the tabular values, which were:

$$X^2_{.99} \text{ at 1 d.f.} = 6.635$$
$$X^2_{.95} \text{ at 1 d.f.} = 3.841$$
$$X^2_{.90} \text{ at 1 d.f.} = 2.706$$

Thus the hypothesis that due process ratings were independent of whether the institutions had New England accreditation was not rejected.

TABLE 7.6

CALCULATION OF THE VALUE OF CHI-SQUARE BASED ON THE DISTRIBUTION OF DUE PROCESS ACCORDING TO THE PRESENCE OR ABSENCE OF NEW ENGLAND ACCREDITATION

X	f	f'	(f - f')	$(f - f')^2$	$\frac{(f - f')^2}{f'}$
Accredited	102	100.11	1.89	3.5721	.03568
Nonaccredited	14	15.89	1.89	3.5721	.22480
Totals	116	116.00			X^2 = .26048

Implications and Limitations of the Survey Results

The survey revealed that New England's private postsecondary institutions had not been oblivious to the virtues of procedural due process even among the nontenured. Differences were apparent throughout the six states as some sectors of the community more closely adhered to court-like standards than did others.

Some trends were apparent in the analyses of individual responses and, to a lesser extent, in the evaluations of procedures as a whole. Given the relatively narrow range of choices promulgated by the courts, the relatively small number of institutions in the survey, and the geographic boundaries, the findings were characterized more by diversity than by uniformity.

The statistics could not reveal what values were inherent in each institution's decision to provide whatever mechanism it had designed or on what grounds a college or university's administration felt able to challenge any attempted state interference in its personnel affairs. The figures were also unable to explain the regard in which autonomy was held or to what extent the management was risk oriented.

None of the analyses had justified a conclusion that location, size, degree offerings, or regional accreditation accounted for the differences that existed in the quality of due process offerings. Rather, the statistical tests gave support to the view that differences among New England's private institutions were less likely to be due to external than internal influences. If the courts, through their abstention philosophy, sought to preserve diversity in higher education, there was nothing in the survey to suggest that they had failed.

Chapter Summary

The purpose of the study was to determine whether or not New England's private postsecondary institutions provided legally sufficient due process procedures for nontenured professors who could obtain grounds for court challenges. Through the employment of a mail questionnaire developed from the findings of Chapter II, information regarding the relevant personnel policies was elicited from responses by the highest academic officers, or their delegees, from more than 87 percent of the institutions. Responses to each of the questions were tabulated and subclassified according to institution size, location, degrees offered, and regional accreditation, thus enabling the reporting of propensities of the population and its components.

More than 95 percent of the colleges and universities reported a policy of giving prior notice, 79.4 percent a hearing, 64.4 percent the maintenance of a record, and 53.5 percent claimed to give additional protections. With the addition of each qualitative factor in each due process component, there was a significant decline in the percent of respondents who gave it. Although New Hampshire's institutions had a consistently lower rate of "yes" answers than did any other state and Rhode Island and Vermont had high incidences of positive responses, regional patterns were generally inconclusive. Likewise, although the largest institutions had the highest due process evaluations, the ratings did not necessarily decline with diminishing size. Some of the smaller schools got some of the higher marks; and as the schools declined in size, they were more willing to give reasons for their actions.

The granting of a hearing was the policy of over 90 percent of New England's largest private colleges but considerably less among the smaller schools. Some of the qualitative hearing ingredients declined to a low of 26.4 percent in the second largest category. Records were maintained by over 64 percent of the institutions, but they were adequate at a little less than 55 percent.

Each of the questionnaires was then rated according to the overall sufficiency of the procedures it represented. Of all the private institutions in New England, slightly more than 25 percent had policies which were regarded by the study as "meaningful" and nearly 21 percent were considered "meaningless." Based on the latitude which Chapter II found most courts were willing to concede to the private sector, however, it was estimated that 79.5 percent of the respondents had due process policies which, while not comporting with the highest judicial mandate, could probably be considered adequate in the face of the usual litigious contest. The largest schools had the highest incidences of adequacy, but otherwise both regional and size patterns were mixed. The institutions offering graduate degrees rated slightly higher than the undergraduate, and the New England accredited schools tended to be slightly above the nonaccredited.

Statistical analyses of the differences observable in each sector of the New England community produced no significant relationships. It was, therefore, noted that the judiciary's objective of preserving higher education's diversity had not been disturbed insofar as nonrenewal procedures in New England were concerned.

CHAPTER V

SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS

Summary

Since the 1960s private institutions of higher education have been subjected to legal actions challenging their traditional immunity from constitutional proscriptions. There was evidence to suggest that because of their collaborations with the state, their ostensibly private actions could be judicially construed as acts of state agents and thus subject to the fourteenth amendment's guarantee of due process. Confusion about both the constitutional accountability of private institutions and the meaning of due process persisted into the late 1970s. If nontenured teachers could acquire either constitutional or contractual entitlements to due process, there was evidence to suggest that instead of reviewing the facts at the public forum, the courts would defer to authentic internal procedures. The pervasiveness of tenure practices in higher education, however, gave cause to doubt that such procedures were generally available to nontenured professors. The inquiry was intended to investigate and report (1) the means by which such due process entitlements could be acquired by contract or by complicity with the state, (2) the likelihood of private institutions being treated as state agents, and (3) the extent to which New England's private sector had armored itself by extending procedural rights to nontenured teachers.

It was found that constitutional protections were obtainable by nontenured faculty in the public sector and that their entitlements represented a standard above which the rights of privately employed teachers could not rise. The relevant fourteenth amendment protections were liberty and property interests, and in higher education the courts tended to view the first amendment liberties as paramount. To a lesser extent, publicly employed teachers were also acknowledged a liberty to teach, which meant that if their dismissals were accompanied by such charges against them as would inhibit their ability to gain employment at other colleges or universities, they would be entitled to have the adverse administrative decisions reviewed. Tenure was found to constitute a protected property interest. Those without tenure, however, could obtain property rights in their positions if the institutions' policies and practices had caused such teachers to have objective expectancies of reemployment. The more common remedy for deprivation of the protected interests was damages rather than reinstatement. The dispute might also be remanded to institutional tribunals for review and to correct any errors in the record.

Similar constitutional rights could potentially be acquired by privately employed teachers; but at the conclusion of the study, the Supreme Court had not addressed that issue directly. Although some non-educational private entities have been held responsible for constitutional promises because of their relationships with the state, most of the theories which supported state action challenges against such associations have failed when attempted against private higher education. The Supreme Court has most often found state action in cases involving equal protection because racial discrimination was the evil against which the fourteenth amendment was directed. Since the amendment empowered Congress to enforce its provisions, however, the Court has upheld civil rights legislation which transcended racial discrimination. Since 1972, for example, educational institutions have been subject to the statutory prohibitions against sex discrimination, which included faculty members. Because some of the ensuing litigation originated before 1972, because the courts have been divided on the criteria for state action jurisdiction, and because neither the states nor Congress have legislatively preempted the universities' right to maintain their own renewal policies, the sex discrimination cases have contributed little to state action theory.

Individually negotiated contracts, objective expectancies of reemployment, and collectively bargained agreements could also form the bases for entitlements to due process in the private sector. Absent a constitutional claim, they would be the only grounds for procedural challenges and have also tended to set the limits for whatever entitlements the teacher might have. The judiciary has shown an express preference for letting the facts of an academic dispute be settled by internally empaneled tribunals, especially when the process designed has comported with procedures resembling the courts' own.

An analysis of state action cases decided in the mid to late 1970s revealed that although the courts have resisted holding collegiate institutions in the private sector as agents of the state, they have also refrained from ruling out the possibility. Contrary to inferences drawn by one study, it was concluded that private university action was not likely to be deemed that of a state agent unless either the reason for the state's involvement with private education was directly related to the private action being challenged or the state dominated the institution to the point of overpowering its policy-making autonomy. Nevertheless, the possibility for due process vulnerability in the private sector remained open, not only through constitutional sources but through contractual expectancies and through the state's latent police power to command it.

A survey of New England's private institutions was conducted as a means for estimating the extent to which they had shielded themselves against faculty assault by providing adequate review procedures, thereby making possible an internal mechanism for the redress of teachers' grievances. Although some element of procedural due process was available at more than 95 percent of the responding institutions, the study rated only about 25 percent as meaningful. Because of the continuing judicial deference to private higher educational autonomy, however, it was estimated that nearly 80 percent of the policies reported were judicially sufficient. Conversely, almost 21 percent were characterized as meaningless, thereby rendering their institutions vulnerable.

Cross-classifying institutions by location, size, degrees granted, and regional accreditation revealed observable differences in the due process evaluations among the various components of the population. Statistical analyses, however, failed to attribute the differences to the variables measured and thus produced no conclusive evidence of external influence on internal policy formulation.

Findings and Conclusions

1. Since 1961 in the major state action cases that involved private postsecondary schools, judges have acknowledged the possibility that state action could be found in the activities of independent colleges and universities. Regulatory conduct of a private athletic association in which there was participation by both public and private educational institutions was held to be the assumption of a government function in the imposition of restrictions on the rights and opportunities of a group of

citizens who were without the opportunity to resist. On the basis of these findings, it was the conclusion of the study that private postsecondary institutions could so ally themselves with the state that they would be compelled to honor the constitutional guarantee of due process.

2. Because of their high regard for educational diversity through institutional autonomy, the courts have demonstrated less willingness to declare the presence of state action in cases involving educational entities than in those in which the litigation was directed against other types of private associations. Because of that reluctance, they have tended to seek alternative remedies for the relief of aggrieved individuals to whom they acknowledged relief was owing. The analysis of state action cases found no departure from that judicial posture and concluded that it remained evident.

3. Although the states have actively furnished higher education through their own resources as well as through their association with private institutions, the courts have not been willing to concede education as a state function. The decisions suggested that their position was not so much that education was not a function of the state but rather that education was not a "prerogative" of the state. For that reason arguments supported by the documentation of a significant state interest or involvement in higher education were, standing alone, irrelevant to the jurisdictional question. It was concluded, therefore, that legislative enactments supporting higher education and/or private postsecondary institutions would not confer agency status on the institutions which profited from that support and would not, therefore, cause the institutions to become constitutionally liable to nontenured faculty.

4. The Supreme Court has not addressed the presence of state

action at a private university in regard to faculty retention policies. However, in a 1974 case in which the justices denied a claim for due process against a private corporation charged with a public interest, they failed to find state action because there was no connection between the reason for the state's involvement and the alleged oppressive conduct. Subsequent lower court pronouncements which resulted from state action contests involving private universities were not inconsistent with the Supreme Court's nexus prerequisite. It was concluded, therefore, that multiple contacts between the state and a private university would not per se be likely to result in a finding of state action. However, if (1) the contacts, support, and regulation reached the point where a particular state assumed a dominant role in university policy making, (2) nontenured faculty in the public sector of that state had acquired the right to due process, (3) the same administrative-faculty relationships prevailed in the private as in the public institutions, and (4) the due process policies had not been preempted by a collective bargaining agreement, the private institutions would be vulnerable to due process challenges.

5. The Supreme Court has been more receptive to a finding of state action where racial discrimination was involved because that was the object of the fourteenth amendment. The amendment also provided that Congress has the power to enforce its provisions through legislation, and the Court's abstention policy has caused it to accede to Congress whenever that representative assembly properly exercised its prerogative. It was the elements of constitutional intent and congressional mandate which accounted for the Court's constrained receptivity toward state action holdings in both racial and sex discrimination so long as the latter form of bias was being practiced after 1972. Prior to that time, colleges and

universities had been exempt from the congressional proscription against sex discrimination in faculty employment. The litigation in connection with sex bias, then, exhibited more of a reaffirmation of judicial restraint than an expansion of state action criteria. The research has concluded that there was no expansion of the state action doctrine during the last half of the 1970s and thus no increase in private postsecondary vulnerability to constitutional due process challenges.

6. The research found no evidence of any legislative intent to exert state police power and command due process for nontenured teachers in the private sector. Generalizations on the constitutionality of such a dictate, therefore, could not be made. Were such an assault on private discretion to take place, however, there was evidence that both the first and fourteenth amendments could be successfully raised in defense of collegiate autonomy. At the conclusion of this research, both theories lay dormant. The inquiry, therefore, drew no conclusions regarding institutional vulnerability to state mandated procedural due process.

7. It was found that the concept of objective expectancies of contract renewal had originated in the private sector and had been given recognition by the Supreme Court. It was concluded that unless there was collective bargaining preemption, administrative policies and practices could create contractual rights to due process among nontenured professors in the private sector.

8. A study of New England's private postsecondary institutions suggested that nearly 80 percent of the respondents had nonrenewal policies which were either equal to or exceeded the minimum procedures that had been given prior judicial approval in noncriminal disputes. The procedures at over 20 percent of them, however, reportedly were inadequate

by the same standard. Nevertheless, the survey results warranted the conclusion that most of the private colleges and universities in New England had nonrenewal policies that would sustain challenges by nontenured faculty.

The findings and conclusions did not support the assumptions that were central to the inquiry. Therefore, the hypothesis that procedural due process in most of New England's private postsecondary sector was not sufficient to sustain challenges by nontenured faculty was rejected.

Answers to the Research Questions in Chapter I

The issues raised in Chapter I have been treated in Chapters II, III, and IV. The following answers were intended to be brief but specific responses to the research questions as presented in Chapter I.

1. What are the governmental interests in higher education with regard to college and university obligations to provide academic due process?

The government's interest in higher education was found to be in preventing arbitrary discrimination in employment and advancement and in maintaining the teachers' right of free expression in matters of public concern. In deference to the academic community's needed autonomy in maintaining its traditional leadership in the pursuit of truth and learning, the courts conceded the universities' right to withhold renewal of nontenured faculty contracts for any or no reason, providing none of the substantive constitutional rights had been abridged. Therefore, procedures would be required where nonrenewal was in retaliation for protected speech or was due to racial or sex discrimination. They would not be required where the institution had exercised a unilateral judgment regarding teaching competence or desirability.

2. What initiatives are available to nontenured professors who wish to challenge administrative decisions not to renew their contracts?

If nontenured teachers could show reasonable grounds to suspect that the nonrenewal decision was capricious, retaliatory, or based on erroneous information, and substantive rights were involved, they would be entitled to internal procedures. They could assert that right by giving notice to the appropriate official, stating the basis for the claim and the essential facts in its support. In the event the teacher was not accorded adequate procedures, he would then have grounds for a federal district court challenge.

3. If postsecondary institutions are found to have procedural obligations, to what extent are the obligations affected by the institutions' public or private character?

Public institutions would have obligations commensurate with the validity of their claim to autonomy weighed against the teachers' individual rights. In that respect, they would be treated essentially as would any other state agent. Private institutions would be vulnerable to a challenge only to the extent that there was state action involvement with the institution which was of such a character that it was motivated by the state's intent to promote faculty employment or to deter arbitrary dismissals in the private sector. Involvement motivated by some other objective, such as providing higher education to the community, would not be of the character that faculty rights to due process would be owing. The express or implied contractual obligations of private institutions would not be treated any differently than would those of public colleges and universities. However, in the absence of relevant state involvement, the contract alternative would be the only grounds for a challenge. The contractual "expectancy of reemployment" to which a privately employed nontenured teacher could be entitled would be subject to a lesser standard of judicial scrutiny than would contracts executed in a commercial setting.

4. For private institutions which have not voluntarily provided pretermination procedures for their nontenured faculty, what conditions might make them vulnerable to due process challenges?

In the absence of contractual duties to grant procedures, private institutions would not be highly vulnerable to procedural challenges unless relevant state action was present, as noted in the answer to question three, or unless a state might elect to exert its police power and impose that obligation whether or not it enumerated the elements. This study uncovered no evidence of any state's exerting its police power for that purpose.

5. If a nontenured teacher can successfully assert an institutional obligation to grant due process, what minimum procedures would withstand judicial scrutiny?

The essentials of due process would depend on the relative importance of the institution's interest in autonomous conduct and the teacher's interest in his professional reputation, his objective expectancy of reemployment, or the complexity of the facts surrounding the administrative action. At a minimum, due process would require prior notice of the intention not to renew the contract and an opportunity for the teacher to present evidence in his own behalf. In view of his nontenured status, his right to present evidence would usually be predicated on the possibility of administrative error and would, therefore, not be a challenge to the institution's right to withhold his contract. In the event of complex issues or a serious threat to his professional reputation, the minimum elements of due process could necessitate additional procedures. A full measure of procedural due process sufficient to withstand close judicial scrutiny would include advance written notice, a statement of reasons, an opportunity to have the issue reviewed in the teacher's presence before a competent and unbiased panel, an opportunity for the teacher to present evidence and testimony, a decision based on substantial evidence presented at the hearing, and a record which would authenticate the presence of these elements. There could be facts so complex or interests so crucial that permitting legal representation to the teacher would be required.

6. Do private postsecondary institutions in New England grant procedures sufficient to meet the judicial test?

The findings of the study supported the view that the majority of New England's private colleges and universities could probably sustain contests challenging the propriety of their nonrenewal decisions in regard to nontenured faculty. While only 25.3 percent of the schools had policies which were in nearly full compliance with the strictest judicial standards, an additional 54.1 percent reported policies which generally complied and, unless some compelling state interest intervened, would probably satisfy most courts. In the aggregate, then, over 79 percent of the private sector participating in the survey provided procedural safeguards which were adequate or better. The population was diversified, however, and some high exposure areas were evident.

The largest colleges and universities in Connecticut were all adequately protected, as were nearly 58 percent of those with student populations of 1001 to 5000. In the latter size group, however, almost 43 percent had "meaningless" policies; and the two smallest categories had 33.3 and 25 percent respectively with the lowest rating. In the aggregate, Connecticut's private sector had an equal rate of the best and the poorest institutional evaluations. It netted nearly 70 percent of the private sector with an "adequate" rating, the second lowest in New England.

As with the rest of northern New England, Maine had no private institutions with student populations greater than 5000. In its largest class, the 1001 to 5000 category, none of the colleges had the top evaluation. Half of the institutions in every category were "rudimentary." As the institutions got smaller, the ratings improved, a phenomenon not duplicated in any other state. Therefore, while its largest were the most vulnerable, 77.8 percent of the state's private sector was adequately protected.

In Massachusetts the largest universities were the best protected, but more of the second largest group had adequate or better preparation for challenges. Only 5 percent of the smallest schools could face a severe challenge, but only 15 percent of them were highly exposed. As a whole, 84.3 percent of the private institutions in the New England state with the most diversified private educational community were adequately prepared for court and, conversely, 15.7 percent were not.

As with its more northern neighbor, none of New Hampshire's largest private institutions elected to give their nontenured teachers the full protection. The two smaller classes were each increasingly willing to do so, but the smallest also had 50 percent with policies rated "meaningless." In all, the New Hampshire institutions which were not adequately shielded comprised 35.7 percent of the state's total, setting a record for the region.

In Rhode Island, as in Connecticut, all of the private schools in the survey with more than 5000 students were awarded the "adequate" label, and half of those earned the highest evaluation. The state's second largest category of institutions, however, was also 100 percent "adequate." There were no private postsecondary institutions smaller than 500 students; but in the 501 to 1000 group, half had designed "meaningless" nonrenewal policies.

Vermont had the highest percentage of the smallest schools with a "meaningful" rating. With 84.6 percent of its private sector rated as "adequate," it was second only to Rhode Island and highest in New England with the "meaningful" evaluation.

Column (1) of Table 8.1 shows the percent of institutions in each state and in the whole of New England which had the lowest vulnerability. Column (3) reports the percent of institutions which had nonrenewal review policies rated by the study as "adequate." Column (4) shows the rate of institutions which were considered to be the most vulnerable to teachers who could acquire sufficient contractual or state action grounds for procedural due process challenges.

Implications and Recommendations

For the nearly 80 percent of New England's private institutions in which procedures were found to be adequate, it could be assumed that (1) faculty rights had not been disregarded, (2) nonrenewal decisions would not precipitate a threat to the institutions' autonomy, and (3) the judiciary should not be expected to interfere with efforts at achieving institutional objectives. In the 20 percent where policies were considered

TABLE 8.1

A SUMMARY OF THE TENABILITY RATINGS OF NEW ENGLAND'S PRIVATE POSTSECONDARY INSTITUTIONS

	(1) Meaningful	(2) Rudimentary	(3) Adequate (1 & 2)	(4) Meaningless
Connecticut	30.4	39.2	69.6	30.4
Maine	27.8	50.0	77.8	22.2
Massachusetts	21.4	62.9	84.3	15.7
New Hampshire	14.3	50.0	64.3	35.7
Rhode Island	25.0	62.5	87.5	12.5
Vermont	46.1	38.5	84.6	15.4
All New England	25.3	54.1	79.4	20.6

inadequate, nontenured faculty would be justified in fearing that their rights were in jeopardy. Moreover, if nontenured faculty could either circumvent or overcome jurisdictional barriers, the institutions would be vulnerable to challenge and to having their internal personnel policies written by the courts. Such institutions also ran the risk of error in their nonrenewal decisions and, because of their unilateral exercise of power, of adversley affecting their organizational harmony and efficiency.

Whether the reason that the private institutions provided the extent of procedural due process that they did was because of their sense of fairness, because they did not realize that they were under no legal compulsion to do so, or because of some other reason was not discernable in the study. Two of the respondents reported in marginal comments that they felt they could not prevent the presence of legal counsel at internal proceedings.

Despite the trauma of the 1960s, the judiciary has generally maintained a high regard for both the private and the public sectors of higher education. The New England study should contribute to a perpetuation of that high regard because it reflected institutional concern for individual faculty rights; and individual rights have had a high priority in the courts. It was also possible that the states have not threatened to use their latent police power because of the generally satisfactory state of well being for their teacher-citizens. If the institutions arrive at their nonrenewal decisions exclusively on the basis of their assessment of teaching competence and if they permit nonrenewed probationary teachers the opportunity to present evidence in their own behalf in an adversarial forum, they should expect little interference by the courts.

The risk remained, however, that the practice of providing a statement of reasons could raise the expectancy thereof and eventually the obligation. Rather than providing written reasons along with the nonrenewal notice, the administration should give nonretained teachers the opportunity to request an informal discussion with the administration; and, upon request, it could be followed with a statement of reasons. If the reasons reflected a discretionary administrative judgment about teaching competence, the hearing would give an opportunity for the aggrieved teacher to introduce other considerations that may merit a reappraisal. If they pertained to other matters, the hearing would provide an opportunity to review the facts and, if necessary, to correct the record or to reconsider the decision. The hearing policy should be represented to the faculty in such a manner that it would raise no expectancy that administrative discretion was being surrendered. Probationary teachers who failed to earn renewal should understand that the hearing was to allow them an opportunity to be heard and to challenge the evidence. The expert and impartial panel could make a recommendation to the administrative decision makers who would then be assured that they had provided every reasonable opportunity to make their final decision a reasoned one.

Surveys of other regions of the United States could reveal to what extent due process was being provided to nontenured faculty and whether or not external influences affected internal policy making. Since a significant portion of the respondents reported that they provided additional protections not listed on the questionnaire, it would be enlightening to determine what those protections might be and to evaluate them. It would be helpful to learn whether substantive rights were available to the same extent as procedural rights and whether collective bargaining in the private sector has influenced the quality of due process.

APPENDIX A

ORIGINAL AND FOLLOW-UP LETTERS OF TRANSMITTAL

THOMAS COLLEGE
Waterville, Maine
04901

March 30, 1979

xxxxxxxxxxxxxxxxxxxxxx
xxxxxxxxxxxxxxxxxxxxxx
xxxxxxxxxxxxxxxxxxxxxx
xxxxxxxxxxxxxxxxxxxxxx

Dear xxxxxxxxxxxxxxxxx

The enclosed questionnaire is part of a study designed to determine the existence, character, and level of academic due process available to nontenured faculty in the private postsecondary sector of New England.

The study will also attempt to measure the extent to which any differences may be attributable to location and size of the institution. It is hoped that the findings will facilitate the development of policy guidelines whose purpose will be to assist administrators in the private sector to minimize their institutions' vulnerability to constitutional due process challenges by nontenured faculty. The results will be compiled and reported in a Ph.D. dissertation in which I am involved.

It will be greatly appreciated if you will complete the questionnaire prior to April 9 and return it in the self-addressed, stamped envelope enclosed.

Sincerely

Richard L. Begin, Director
Division of Business

THOMAS COLLEGE
Waterville, Maine
04901

April 19, 1979

xxxxxxxxxxxxxxxxxxxxxxx
xxxxxxxxxxxxxxxxxxxxxxx
xxxxxxxxxxxxxxxxxxxxxxx
xxxxxxxxxxxxxxxxxxxxxxx

Dear xxxxxxxxxxxxxxxxxx

Three weeks ago you were sent a questionnaire requesting information about your institution's policies regarding the termination or nonrenewal of nontenured faculty. The study is important in that it will attempt to measure to what extent private institutions of higher education may be vulnerable to constitutional due process challenges by such faculty members.

The response rate has been favorable; but since there are relatively few institutions in the survey, nonrespondents can have a distorting effect on the results. As I mentioned before, your institution's identity will not be revealed.

I realize that you receive many questionnaires and that I am imposing on your time. Your response, however, will make an important contribution to the study. I will be very grateful if you will return the enclosed questionnaire on or before April 30.

Sincerely

Richard L. Begin, Director
Division of Business

THOMAS COLLEGE
Waterville, Maine
04901

May 11, 1979

xxxxxxxxxxxxxxxxxxxxxxx
xxxxxxxxxxxxxxxxxxxxxxx
xxxxxxxxxxxxxxxxxxxxxxx
xxxxxxxxxxxxxxxxxxxxxxx

Dear xxxxxxxxxxxxxxxxx

Once again I ask your cooperation by requesting that you complete the enclosed questionnaire. Nearly three-fourths of New England's private postsecondary institutions have responded. In three states the replies exceed 80 percent.

In an attempt to gain an understanding of why some have not answered, I have gone over the correspondence that was enclosed with several completed instruments. Some respondents indicated that because of their special character, their policies may not be pertinent to my study. Others noted such things as appointing their faculty on a course-by-course basis, the lack of any formal contract system, or their nontraditional organization.

A critical part of my study is an attempt to profile the entire private sector of higher education in New England which, as you know, represents an extremely diverse community. It is not important, therefore, whether your procedures are or are not similar to those of other colleges or universities. It is undoubtedly conceivable that you could wish to terminate an existing faculty appointment or fail to renew the position of a faculty member who expects renewal. The questionnaire should be completed according to your best estimate of how that type of situation would be handled.

The study pertains to faculty without tenure, so it is appropriate for the questionnaire to be answered even if you do not have a tenure policy. The criteria listed on the first page provide a basis for making a judgment as to how the questions should be answered.

Again, your response will make an important contribution to the study. I will be very grateful if you will return the enclosed questionnaire as soon as possible.

Sincerely

Richard L. Begin, Director
Division of Business

THOMAS COLLEGE
Waterville, Maine
04901

June 1, 1979

xxxxxxxxxxxxxxxxxxxxxxx
xxxxxxxxxxxxxxxxxxxxxxx
xxxxxxxxxxxxxxxxxxxxxxx
xxxxxxxxxxxxxxxxxxxxxxx

Dear xxxxxxxxxxxxxxxxxx

I am making another plea for your response to the enclosed questionnaire.

Please note, the questionnaire pertains to faculty WHO DO NOT HAVE TENURE. It refers to instances where you may wish to TERMINATE A NONTENURED faculty member or FAIL TO RENEW A NONTENURED faculty member who might expect to be renewed. The criteria for making a judgment are listed on the enclosed instruction sheet.

Your answers will be applicable EVEN IF YOUR INSTITUTION DOES NOT HAVE A TENURE POLICY.

A completed questionnaire from your office would be a very big help to me in my study.

Sincerely

Richard L. Begin, Director
Division of Business

APPENDIX B

FREQUENCY OF ANSWERS TO THE QUESTIONNAIRE BY STATE AND SIZE OF INSTITUTION

1. Is a nontenured faculty member given advance notice of the institution's decision not to renew his or her contract?

	Percent	Total	CT	ME	MA	NH	RI	VT
Yes								
Over 5000	8.9	13	4	NA	7	NA	2	NA
1001-5000	36.3	53	7	4	29	5	4	4
501-1000	19.2	28	3	4	12	5	2	2
500 or Less	30.8	45	8	9	20	2	NA	6
Totals		139	22	17	68	12	8	12
Percents	95.2		95.7	94.4	97.1	85.8	100.0	92.3
No								
Over 5000	0.0	0	0	NA	0	NA	0	NA
1001-5000	0.0	0	0	0	0	0	0	0
501-1000	1.4	2	0	0	2	0	0	0
500 or Less	.7	1	0	0	0	1	NA	0
Totals		3	0	0	2	1	0	0
Percents	2.1		0	0	2.9	7.1	0	0
Uncertain								
Over 5000	0.0	0	0	NA	0	NA	0	NA
1001-5000	0.0	0	0	0	0	0	0	0
501-1000	0.0	0	0	0	0	0	0	0
500 or Less	2.7	4	1	1	0	1	NA	1
Totals		4	1	1	0	1	0	1
Percents	2.7		4.3	5.6	0	7.1	0	7.7
Total Responses	100.0	146	23	18	70	14	8	13

1. IF YES

(a) Is the notice in writing?

	Percent	Total	CT	ME	MA	NH	RI	VT
Yes								
Over 5000	8.6	12	4	NA	6	NA	2	NA
1001-5000	36.0	50	7	4	27	4	4	4
501-1000	18.0	25	3	3	11	4	2	2
500 or Less	26.6	37	4	8	18	1	NA	6
Totals		124	18	15	62	9	8	12
Percents	89.2		81.8	88.2	91.2	75.0	100.0	100.0
No								
Over 5000	0.0	0	0	NA	0	NA	0	NA
1001-5000	1.5	2	0	0	1	1	0	0
501-1000	1.5	2	0	0	1	1	0	0
500 or Less	5.0	7	4	1	2	0	NA	0
Totals		11	4	1	4	2	0	0
Percents	8.0		18.2	5.9	5.9	16.7	0	0
Uncertain								
Over 5000	.7	1	0	NA	1	NA	0	NA
1001-5000	.7	1	0	0	1	0	0	0
501-1000	.7	1	0	1	0	0	0	0
500 or Less	.7	1	0	0	0	1	NA	0
Totals		4	0	1	2	1	0	0
Percents	2.8		0	5.9	2.9	8.3	0	0
Total Responses	100.0	139	22	17	68	12	8	12

1. IF YES

(b) Does the notice give reasons for the decision?

	Percent	Total	CT	ME	MA	NH	RI	VT
Yes								
Over 5000	2.9	4	2	NA	1	NA	1	NA
1001-5000	16.5	23	4	1	14	1	2	1
501-1000	13.0	18	2	2	8	3	2	1
500 or Less	23.0	32	7	6	12	2	NA	5
Totals		77	15	9	35	6	5	7
Percents	55.4		68.2	52.9	51.5	50.0	62.5	58.3
No								
Over 5000	5.0	7	1	NA	5	NA	1	NA
1001-5000	16.6	23	2	3	11	2	2	3
501-1000	4.3	6	0	1	3	1	0	1
500 or Less	6.5	9	1	2	5	0	NA	1
Totals		45	4	6	24	3	3	5
Percents	32.4		18.2	35.3	35.3	25.0	37.5	41.7
Uncertain								
Over 5000	1.4	2	1	NA	1	NA	0	NA
1001-5000	5.0	7	1	0	4	2	0	0
501-1000	2.9	4	1	1	1	1	0	0
500 or Less	2.9	4	0	1	3	0	NA	0
Totals		17	3	2	9	3	0	0
Percents	12.2		13.6	11.8	13.2	25.0	0	0
Total Responses	100.0	139	22	17	68	12	8	12

2. If the nontenured faculty member asserts that the nonrenewal or termination constitutes a wrong against him or her and makes timely notice to the appropriate person or committee requesting a hearing, will the hearing be granted?

	Percent	Total	CT	ME	MA	NH	RI	VT
Yes								
Over 5000	8.2	12	4	NA	6	NA	2	NA
1001-5000	29.4	43	4	2	27	3	4	3
501-1000	15.1	22	2	3	10	4	1	2
500 or Less	26.7	39	6	9	16	2	NA	6
Totals		116	16	14	59	9	7	11
Percents	79.4		69.6	77.8	84.3	64.3	87.5	84.6
No								
Over 5000	.7	1	0	NA	1	NA	0	NA
1001-5000	4.8	7	3	2	1	1	0	0
501-1000	4.1	6	0	1	3	1	1	0
500 or Less	1.4	2	0	0	2	0	NA	0
Totals		16	3	3	7	2	1	0
Percents	11.0		13.0	16.7	10.0	14.3	12.5	0
Uncertain								
Over 5000	0.0	0	0	NA	0	NA	0	NA
1001-5000	2.0	3	0	0	1	1	0	1
501-1000	1.4	2	1	0	1	0	0	0
500 or Less	6.2	9	3	1	2	2	NA	1
Totals		14	4	1	4	3	0	2
Percents	9.6		17.4	5.5	5.7	21.4	0	15.4
Total Responses	100.0	146	23	18	70	14	8	13

2. IF YES

(a) Will the hearing be before a panel which

1. possesses academic expertise?

Yes

	Percent	Total	CT	ME	MA	NH	RI	VT
Over 5000	8.6	10	4	NA	4	NA	2	NA
1001-5000	33.6	39	4	2	25	2	3	3
501-1000	17.3	20	2	3	9	4	1	1
500 or Less	26.7	31	5	7	13	2	NA	4
Totals		100	15	12	51	8	6	8
Percents	86.2		93.8	85.7	86.4	88.9	85.7	72.7

No

	Percent	Total	CT	ME	MA	NH	RI	VT
Over 5000	0.0	0	0	NA	0	NA	0	NA
1001-5000	1.7	2	0	0	0	1	1	0
501-1000	.9	1	0	0	0	0	0	1
500 or Less	0.0	0	0	0	0	0	NA	0
Totals		3	0	0	0	1	1	1
Percents	2.6		0	0	0	11.1	14.3	9.1

Uncertain

	Percent	Total	CT	ME	MA	NH	RI	VT
Over 5000	1.7	2	0	NA	2	NA	0	NA
1001-5000	1.7	2	0	0	2	0	0	0
501-1000	.9	1	0	0	1	0	0	0
500 or Less	6.9	8	1	2	3	0	NA	2
Totals		13	1	2	8	0	0	2
Percents	11.2		6.2	14.3	13.6	0	0	18.2
Total Responses	100.0	116	16	14	59	9	7	11

2. IF YES

(a) Will the hearing be before a panel which

2. is apparently impartial toward the actions taken?

	Percent	Total	CT	ME	MA	NH	RI	VT
Yes								
Over 5000	8.6	10	4	NA	4	NA	2	NA
1001-5000	32.8	38	4	2	24	2	3	3
501-1000	17.2	20	2	3	9	4	1	1
500 or Less	26.7	31	4	8	13	2	NA	4
Totals		99	14	13	50	8	6	8
Percents	85.3		87.4	92.9	84.7	88.9	85.7	72.7
No								
Over 5000	0.0	0	0	NA	0	NA	0	NA
1001-5000	2.6	3	0	0	1	1	1	0
501-1000	.9	1	0	0	0	0	0	1
500 or Less	.9	1	1	0	0	0	NA	0
Totals		5	1	0	1	1	1	1
Percents	4.4		6.3	0	1.7	11.1	14.3	9.1
Uncertain								
Over 5000	1.7	2	0	NA	2	NA	0	NA
1001-5000	1.7	2	0	0	2	0	0	0
501-1000	.9	1	0	0	1	0	0	0
500 or Less	6.0	7	1	1	3	0	NA	2
Totals		12	1	1	8	0	0	2
Percents	10.3		6.3	7.1	13.6	0	0	18.2
Total Responses	100.0	116	16	14	59	9	7	11

2. IF YES

(b) Will the faculty member be entitled to

1. produce witnesses and evidence?

Yes

	Percent	Total	CT	ME	MA	NH	RI	VT
Over 5000	6.9	8	2	NA	5	NA	1	NA
1001-5000	25.9	30	4	1	18	1	3	3
501-1000	16.4	19	2	3	9	3	1	1
500 or Less	24.1	28	4	8	11	1	NA	4
Totals		85	12	12	43	5	5	8
Percents	73.3		75.0	85.8	72.9	55.6	71.4	72.7

No

	Percent	Total	CT	ME	MA	NH	RI	VT
Over 5000	1.7	2	1	NA	0	NA	1	NA
1001-5000	4.3	5	0	1	3	1	0	0
501-1000	.9	1	0	0	0	0	0	1
500 or Less	0.0	0	0	0	0	0	NA	0
Totals		8	1	1	3	1	1	1
Percents	6.9		6.2	7.1	5.1	11.1	14.3	9.1

Uncertain

	Percent	Total	CT	ME	MA	NH	RI	VT
Over 5000	1.7	2	1	NA	1	NA	0	NA
1001-5000	6.9	8	0	0	6	1	1	0
501-1000	1.7	2	0	0	1	1	0	0
500 or Less	9.5	11	2	1	5	1	NA	2
Totals		23	3	1	13	3	1	2
Percents	19.8		18.8	7.1	22.0	33.3	14.3	18.2
Total Responses	100.0	116	16	14	59	9	7	11

2. IF YES

(b) Will the faculty member be entitled to

2. face witnesses produced by the institution?

	Percent	Total	CT	ME	MA	NH	RI	VT
Yes								
Over 5000	6.0	7	2	NA	4	NA	1	NA
1001-5000	12.9	15	2	0	10	0	2	1
501-1000	13.8	16	2	3	7	3	0	1
500 or Less	19.0	22	5	6	6	1	NA	4
Totals		60	11	9	27	4	3	6
Percents	51.7		68.8	64.3	45.8	44.5	42.9	54.5
No								
Over 5000	2.6	3	1	NA	1	NA	1	NA
1001-5000	9.5	11	1	2	5	2	1	0
501-1000	3.4	4	0	0	2	0	1	1
500 or Less	0.0	0	0	0	0	0	NA	0
Totals		18	2	2	8	2	3	1
Percents	15.5		12.5	14.3	13.5	22.2	42.9	9.1
Uncertain								
Over 5000	1.7	2	1	NA	1	NA	0	NA
1001-5000	14.7	17	1	0	12	1	1	2
501-1000	1.7	2	0	0	1	1	0	0
500 or Less	14.7	17	1	3	10	1	NA	2
Totals		38	3	3	24	3	1	4
Percents	32.8		18.7	21.4	40.7	33.3	14.2	36.4
Total Responses	100.0	116	16	14	59	9	7	11

2. IF YES

(b) Will the faculty member be entitled to

3. cross-examine witnesses produced by the institution?

Yes

	Percent	Total	CT	ME	MA	NH	RI	VT
Over 5000	6.0	7	2	NA	4	NA	1	NA
1001-5000	12.1	14	2	0	9	0	2	1
501-1000	9.5	11	2	2	4	2	0	1
500 or Less	16.4	19	4	6	4	1	NA	4
Totals		51	10	8	21	3	3	6
Percents	44.0		62.5	57.1	35.6	33.3	42.9	54.5
No								
Over 5000	2.6	3	1	NA	1	NA	1	NA
1001-5000	9.5	11	1	2	5	2	1	0
501-1000	4.3	5	0	0	3	0	1	1
500 or Less	0.0	0	0	0	0	0	NA	0
Totals		19	2	2	9	2	3	1
Percents	16.4		12.5	14.3	15.3	22.2	42.9	9.1
Uncertain								
Over 5000	1.7	2	1	NA	1	NA	0	NA
1001-5000	15.5	18	1	0	13	1	1	2
501-1000	5.2	6	0	1	3	2	0	0
500 or Less	17.2	20	2	3	12	1	NA	2
Totals		46	4	4	29	4	1	4
Percents	39.6		25.0	28.6	49.1	44.5	14.2	36.4
Total Responses	100.0	116	16	14	59	9	7	11

2. IF YES

(c) Will the faculty member be entitled to representation by legal counsel?

	Percent	Total	CT	ME	MA	NH	RI	VT
Yes								
Over 5000	3.4	4	2	NA	2	NA	0	NA
1001-5000	18.1	21	2	0	13	1	3	2
501-1000	7.8	9	0	2	4	2	0	1
500 or Less	15.5	18	4	4	8	0	NA	2
Totals		52	8	6	27	3	3	5
Percents	44.8		50.0	42.9	45.8	33.3	42.9	45.5
No								
Over 5000	5.2	6	1	NA	3	NA	2	NA
1001-5000	8.6	10	2	2	4	1	1	0
501-1000	5.2	6	0	0	4	0	1	1
500 or Less	2.6	3	0	1	2	0	NA	0
Totals		25	3	3	13	1	4	1
Percents	21.6		18.8	21.4	22.0	11.1	57.1	9.0
Uncertain								
Over 5000	1.7	2	1	NA	1	NA	0	NA
1001-5000	10.4	12	0	0	10	1	0	1
501-1000	6.0	7	2	1	2	2	0	0
500 or Less	15.5	18	2	4	6	2	NA	4
Totals		39	5	5	19	5	0	5
Percents	33.6		31.2	35.7	32.2	55.6	0	45.5
Total Responses	100.0	116	16	14	59	9	7	11

3. Will an opportunity be provided for the development of a record of the proceedings if a hearing is held; or if no hearing, of the events leading to the decision not to renew or to terminate?

	Percent	Total	CT	ME	MA	NH	RI	VT
Yes								
Over 5000	6.8	10	3	NA	5	NA	2	NA
1001-5000	26.7	39	5	1	24	3	3	3
501-1000	11.0	16	1	3	5	4	1	2
500 or Less	19.9	29	4	5	13	1	NA	6
Totals		94	13	9	47	8	6	11
Percents	64.4		56.5	50.0	67.2	57.2	75.0	84.6
No								
Over 5000	0.0	0	0	NA	0	NA	0	NA
1001-5000	5.5	8	1	3	2	1	1	0
501-1000	4.1	6	0	1	4	0	1	0
500 or Less	2.7	4	0	2	2	0	NA	0
Totals		18	1	6	8	1	2	0
Percents	12.3		4.4	33.3	11.4	7.1	25.0	0
Uncertain								
Over 5000	2.1	3	1	NA	2	NA	0	NA
1001-5000	4.1	6	1	0	3	1	0	1
501-1000	5.5	8	2	0	5	1	0	0
500 or Less	11.6	17	5	3	5	3	NA	1
Totals		34	9	3	15	5	0	2
Percents	23.3		39.1	16.7	21.4	35.7	0	15.4
Total Responses	100.0	146	23	18	70	14	8	13

3. IF YES

(a) Will the record demonstrate that the decision was arrived at through appraisal of the evidence?

Yes

	Percent	Total	CT	ME	MA	NH	RI	VT
Over 5000	8.5	8	2	NA	4	NA	2	NA
1001-5000	37.2	35	4	1	21	3	3	3
501-1000	12.8	12	1	1	4	4	1	1
500 or Less	26.6	25	4	5	10	1	NA	5
Totals		80	11	7	39	8	6	9
Percents	85.1		84.6	77.8	83.0	100.0	100.0	81.8

No

	Percent	Total	CT	ME	MA	NH	RI	VT
Over 5000	0.0	0	0	NA	0	NA	0	NA
1001-5000	0.0	0	0	0	0	0	0	0
501-1000	0.0	0	0	0	0	0	0	0
500 or Less	0.0	0	0	0	0	0	NA	0
Totals		0	0	0	0	0	0	0
Percents	0.0		0	0	0	0	0	0

Uncertain

	Percent	Total	CT	ME	MA	NH	RI	VT
Over 5000	2.0	2	1	NA	1	NA	0	NA
1001-5000	4.3	4	1	0	3	0	0	0
501-1000	4.3	4	0	2	1	0	0	1
500 or Less	4.3	4	0	0	3	0	NA	1
Totals		14	2	2	8	0	0	2
Percents	14.9		15.4	22.2	17.0	0	0	18.2
Total Responses	100.0	94	13	9	47	8	6	11

4. In your opinion does your institution provide protections to the nontenured faculty members in addition to those enumerated on this questionnaire?

Yes

	Percent	Total	CT	ME	MA	NH	RI	VT
Over 5000	4.1	6	0	NA	4	NA	2	NA
1001-5000	24.6	36	6	1	20	4	2	3
501-1000	10.3	15	3	2	4	3	1	2
500 or Less	14.4	21	4	4	9	1	NA	3
Totals		78	13	7	37	8	5	8
Percents	53.4		56.5	38.9	52.9	57.2	62.5	61.5
No								
Over 5000	3.4	5	3	NA	2	NA	0	NA
1001-5000	7.5	11	1	2	5	0	2	1
501-1000	6.2	9	0	2	5	1	1	0
500 or Less	9.6	14	2	3	5	2	NA	2
Totals		39	6	7	17	3	3	3
Percents	26.7		26.1	38.9	24.3	21.4	37.5	23.1
Uncertain								
Over 5000	1.4	2	1	NA	1	NA	0	NA
1001-5000	4.1	6	0	1	4	1	0	0
501-1000	4.1	6	0	0	5	1	0	0
500 or Less	10.3	15	3	3	6	1	NA	2
Totals		29	4	4	16	3	0	2
Percents	19.9		17.4	22.2	22.8	21.4	0	15.4
Total Responses	100.0	146	23	18	70	14	8	13

APPENDIX C

EVALUATIONS OF INSTITUTIONAL POLICIES IN THE NORTHERN AND SOUTHERN REGIONS AND IN EACH STATE

EVALUATIONS OF INSTITUTIONAL POLICIES IN NORTHERN NEW ENGLAND

N = Prior Notice H = Hearing R = Record
A = Adequate I = Inadequate 0 = Not Provided

Possible Combinations			Size and Number of Institutions with each Rating				
N	H	R	Total	Over 5000	1001-5000	501-1000	500 or Less
			Meaningful				
A	A	A	9	...	...	3	6
A	A	I	...	...	...	...	...
I	A	A	4	...	1	...	3
			Rudimentary				
I	A	I	1	...	...	1	...
A	I	A	6	...	3	1	2
I	I	A	4	...	3	1	...
A	I	I	2	...	...	1	1
I	I	I	1	...	...	1	...
A	A	0	...	...	...	...	...
I	A	0	1	...	...	1	...
A	I	0	2	...	...	...	2
I	I	0	4	...	1	...	3
			Trivial				
0	A	A	...	...	...	...	...
0	A	I	...	...	...	...	...
0	I	A	...	...	...	...	...
0	A	0	...	...	...	...	...
0	I	I	...	...	...	...	...
			Meaningless				
0	I	0	...	...	...	...	...
A	0	A	...	...	...	...	...
I	0	A	1	...	...	1	...
0	0	A	...	...	...	...	...
A	0	I	...	...	...	...	...
I	0	I	...	...	...	...	...
0	0	I	...	...	...	...	...
A	0	0	...	...	...	...	...
I	0	0	6	...	5	1	...
0	0	0	4	...	...	...	4

EVALUATIONS OF INSTITUTIONAL POLICIES IN SOUTHERN NEW ENGLAND

N = Prior Notice H = Hearing R = Record
A = Adequate I = Inadequate 0 = Not Provided

Possible Combinations			Size and Number of Institutions with each Rating				
N	H	R	Total	Over 5000	1001-5000	501-1000	500 or Less
			Meaningful				
A	A	A	16	3	9	3	1
A	A	I	1	. . .	1	. . .	. . .
I	A	A	7	2	2	. . .	3
			Rudimentary				
I	A	I	1	1	. . .	. . .	. . .
A	I	A	17	1	8	2	6
I	I	A	13	2	8	1	2
A	I	I	3	. . .	1	. . .	2
I	I	I	3	1	1	. . .	1
A	A	O	3	. . .	. . .	2	1
I	A	O	1	. . .	. . .	. . .	1
A	I	O	4	. . .	1	1	2
I	I	O	13	2	4	3	4
			Trivial				
O	A	A	. . .	. . .	. . .	. . .	. . .
O	A	I	. . .	. . .	. . .	. . .	. . .
O	I	A	. . .	. . .	. . .	. . .	. . .
O	A	O	. . .	. . .	. . .	. . .	. . .
O	I	I	. . .	. . .	. . .	. . .	. . .
			Meaningless				
O	I	O	1	. . .	. . .	1	. . .
A	O	A	1	. . .	. . .	. . .	1
I	O	A	2	. . .	1	. . .	1
O	O	A	. . .	. . .	. . .	. . .	. . .
A	O	I	1	. . .	. . .	1	. . .
I	O	I	1	. . .	1	. . .	. . .
O	O	I	. . .	. . .	. . .	. . .	. . .
A	O	O	3*	. . .	. . .	2	. . .
I	O	O	8	1	3	2	2
O	O	O	2	. . .	. . .	1	1

*One institution nontraditional, size not applicable.

EVALUATIONS OF INSTITUTIONAL POLICIES IN CONNECTICUT

N = Prior Notice H = Hearing R = Record
A = Adequate I = Inadequate O = Not Provided

Possible Combinations			Size and Number of Institutions with each Rating				
N	H	R	Total	Over 5000	1001-5000	501-1000	500 or Less
			Meaningful				
A	A	A	5	1	2	1	1
A	A	I	. . .	. . .	. . .	. . .	. . .
I	A	A	2	. . .	. . .	. . .	2
			Rudimentary				
I	A	I	1	1	. . .	. . .	. . .
A	I	A	4	1	2	. . .	1
I	I	A	. . .	. . .	. . .	. . .	. . .
A	I	I	. . .	. . .	. . .	. . .	. . .
I	I	I	. . .	. . .	. . .	. . .	. . .
A	A	O	1	. . .	. . .	1	. . .
I	A	O	1	. . .	. . .	. . .	1
A	I	O	. . .	. . .	. . .	. . .	. . .
I	I	O	2	1	. . .	. . .	1
			Trivial				
O	A	A	. . .	. . .	. . .	. . .	. . .
O	A	I	. . .	. . .	. . .	. . .	. . .
O	I	A	. . .	. . .	. . .	. . .	. . .
O	A	O	. . .	. . .	. . .	. . .	. . .
O	I	I	. . .	. . .	. . .	. . .	. . .
			Meaningless				
O	I	O	. . .	. . .	. . .	. . .	. . .
A	O	A	. . .	. . .	. . .	. . .	. . .
I	O	A	. . .	. . .	. . .	. . .	. . .
O	O	A	. . .	. . .	. . .	. . .	. . .
A	O	I	. . .	. . .	. . .	. . .	. . .
I	O	I	1	. . .	1	. . .	. . .
O	O	I	. . .	. . .	. . .	. . .	. . .
A	O	O	1*	. . .	. . .	. . .	. . .
I	O	O	4	. . .	2	1	1
O	O	O	1	. . .	. . .	. . .	1

*One institution nontraditional, size not applicable.

EVALUATIONS OF INSTITUTIONAL POLICIES IN MAINE

N = Prior Notice H = Hearing R = Record
A = Adequate I = Inadequate O = Not Provided

Possible Combinations			Size and Number of Institutions with each Rating				
N	H	R	Total	Over 5000*	1001-5000	501-1000	500 or Less
			Meaningful				
A	A	A	3	...	...	1	2
A	A	I	...	...	...	...	...
I	A	A	2	...	...	...	2
			Rudimentary				
I	A	I	1	...	...	1	...
A	I	A	2	...	1	...	1
I	I	A	...	...	...	...	...
A	I	I	1	...	...	1	...
I	I	I	...	...	...	...	...
A	A	O	...	...	...	...	...
I	A	O	...	...	...	...	...
A	I	O	2	...	...	...	2
I	I	O	3	...	1	...	2
			Trivial				
O	A	A	...	...	...	...	...
O	A	I	...	...	...	...	...
O	I	A	...	...	...	...	...
O	A	O	...	...	...	...	...
O	I	I	...	...	...	...	...
			Meaningless				
O	I	O	...	...	...	...	...
A	O	A	...	...	...	...	...
I	O	A	...	...	...	...	...
O	O	A	...	...	...	...	...
A	O	I	...	...	...	...	...
I	O	I	...	...	...	...	...
O	O	I	...	...	...	...	...
A	O	O	...	...	...	...	...
I	O	O	3	...	2	1	...
O	O	O	1	...	...	...	1

*Not applicable

EVALUATIONS OF INSTITUTIONAL POLICIES IN MASSACHUSETTS

N = Prior Notice H = Hearing R = Record
A = Adequate I = Inadequate O = Not Provided

Possible Combinations			Size and Number of Institutions with each Rating				
N	H	R	Total	Over 5000	1001-5000	501-1000	500 or Less
			Meaningful				
A	A	A	9	1	6	2	. . .
A	A	I	1	. . .	1	. . .	. . .
I	A	A	5	2	2	. . .	1
			Rudimentary				
I	A	I	. . .	. . .	. . .	. . .	. . .
A	I	A	11	. . .	5	1	5
I	I	A	11	1	7	1	2
A	I	I	3	. . .	1	. . .	2
I	I	I	3	1	1	. . .	1
A	A	O	2	. . .	. . .	1	1
I	A	O	. . .	. . .	. . .	. . .	. . .
A	I	O	4	. . .	1	1	2
I	I	O	10	1	3	3	3
			Trivial				
O	A	A	. . .	. . .	. . .	. . .	. . .
O	A	I	. . .	. . .	. . .	. . .	. . .
O	I	A	. . .	. . .	. . .	. . .	. . .
O	A	O	. . .	. . .	. . .	. . .	. . .
O	I	I	. . .	. . .	. . .	. . .	. . .
			Meaningless				
O	I	O	1	. . .	. . .	1	. . .
A	O	A	1	. . .	. . .	. . .	1
I	O	A	2	. . .	1	. . .	1
O	O	A	. . .	. . .	. . .	. . .	. . .
A	O	I	1	. . .	. . .	1	. . .
I	O	I	. . .	. . .	. . .	. . .	. . .
O	O	I	. . .	. . .	. . .	. . .	. . .
A	O	O	1	. . .	. . .	1	. . .
I	O	O	4	1	1	1	1
O	O	O	1	. . .	. . .	1	. . .

EVALUATIONS OF INSTITUTIONAL POLICIES IN NEW HAMPSHIRE

N = Prior Notice H = Hearing R = Record
A = Adequate I = Inadequate 0 = Not Provided

Possible Combinations			Size and Number of Institutions with each Rating				
N	H	R	Total	Over 5000*	1001-5000	501-1000	500 or Less
			Meaningful				
A	A	A	2	...	...	1	1
A	A	I	...	...	...	...	...
I	A	A	...	...	...	...	...
			Rudimentary				
I	A	I	...	...	...	...	...
A	I	A	2	...	1	1	...
I	I	A	3	...	2	1	...
A	I	I	...	...	...	...	...
I	I	I	...	...	...	...	...
A	A	0	...	...	...	...	...
I	A	0	1	...	...	1	...
A	I	0	...	...	...	...	...
I	I	0	1	...	...	...	1
			Trivial				
0	A	A	...	...	...	...	...
0	A	I	...	...	...	...	...
0	I	A	...	...	...	...	...
0	A	0	...	...	...	...	...
0	I	I	...	...	...	...	...
			Meaningless				
0	I	0	...	...	...	...	...
A	0	A	...	...	...	...	...
I	0	A	1	...	...	1	...
0	0	A	...	...	...	...	...
A	0	I	...	...	...	...	...
I	0	I	...	...	...	...	...
0	0	I	...	...	...	...	...
A	0	0	...	...	...	...	...
I	0	0	2	...	2	...	...
0	0	0	2	...	...	...	2

*Not applicable

EVALUATIONS OF INSTITUTIONAL POLICIES IN RHODE ISLAND

N = Prior Notice H = Hearing R = Record
A = Adequate I = Inadequate O = Not Provided

Possible Combinations			Size and Number of Institutions with each Rating				
N	H	R	Total	Over 5000	1001-5000	501-1000	500 or Less*
			Meaningful				
A	A	A	2	1	1	. . .	. . .
A	A	I	. . .	. . .	. . .	. . .	. . .
I	A	A	. . .	. . .	. . .	. . .	. . .
			Rudimentary				
I	A	I	. . .	. . .	. . .	. . .	. . .
A	I	A	2	. . .	1	1	. . .
I	I	A	2	1	1	. . .	. . .
A	I	I	. . .	. . .	. . .	. . .	. . .
I	I	I	. . .	. . .	. . .	. . .	. . .
A	A	O	. . .	. . .	. . .	. . .	. . .
I	A	O	. . .	. . .	. . .	. . .	. . .
A	I	O	. . .	. . .	. . .	. . .	. . .
I	I	O	1	. . .	1	. . .	. . .
			Trivial				
O	A	A	. . .	. . .	. . .	. . .	. . .
O	A	I	. . .	. . .	. . .	. . .	. . .
O	I	A	. . .	. . .	. . .	. . .	. . .
O	A	O	. . .	. . .	. . .	. . .	. . .
O	I	I	. . .	. . .	. . .	. . .	. . .
			Meaningless				
O	I	O	. . .	. . .	. . .	. . .	. . .
A	O	A	. . .	. . .	. . .	. . .	. . .
I	O	A	. . .	. . .	. . .	. . .	. . .
O	O	A	. . .	. . .	. . .	. . .	. . .
A	O	I	. . .	. . .	. . .	. . .	. . .
I	O	I	. . .	. . .	. . .	. . .	. . .
O	O	I	. . .	. . .	. . .	. . .	. . .
A	O	O	1	. . .	. . .	1	. . .
I	O	O	. . .	. . .	. . .	. . .	. . .
O	O	O	. . .	. . .	. . .	. . .	. . .

*Not applicable

EVALUATIONS OF INSTITUTIONAL POLICIES IN VERMONT

N = Prior Notice H = Hearing R = Record
A = Adequate I = Inadequate O = Not Provided

Possible Combinations			Size and Number of Institutions with each Rating				
N	H	R	Total	Over 5000*	1001-5000	501-1000	500 or Less
			Meaningful				
A	A	A	4	. . .	. . .	1	3
A	A	I	. . .	. . .	. . .	. . .	. . .
I	A	A	2	. . .	1	. . .	1
			Rudimentary				
I	A	I	. . .	. . .	. . .	. . .	. . .
A	I	A	2	. . .	1	. . .	1
I	I	A	1	. . .	1	. . .	. . .
A	I	I	1	. . .	. . .	. . .	1
I	I	I	1	. . .	. . .	1	. . .
A	A	O	. . .	. . .	. . .	. . .	. . .
I	A	O	. . .	. . .	. . .	. . .	. . .
A	I	O	. . .	. . .	. . .	. . .	. . .
I	I	O	. . .	. . .	. . .	. . .	. . .
			Trivial				
O	A	A	. . .	. . .	. . .	. . .	. . .
O	A	I	. . .	. . .	. . .	. . .	. . .
O	I	A	. . .	. . .	. . .	. . .	. . .
O	A	O	. . .	. . .	. . .	. . .	. . .
O	I	I	. . .	. . .	. . .	. . .	. . .
			Meaningless				
O	I	O	. . .	. . .	. . .	. . .	. . .
A	O	A	. . .	. . .	. . .	. . .	. . .
I	O	A	. . .	. . .	. . .	. . .	. . .
O	O	A	. . .	. . .	. . .	. . .	. . .
A	O	I	. . .	. . .	. . .	. . .	. . .
I	O	I	. . .	. . .	. . .	. . .	. . .
O	O	I	. . .	. . .	. . .	. . .	. . .
A	O	O	. . .	. . .	. . .	. . .	. . .
I	O	O	1	. . .	1	. . .	. . .
O	O	O	1	. . .	. . .	. . .	1

*Not applicable

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